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FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

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4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, July 14, 2009
9:00 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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Reader Aids
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To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

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Presidential Documents

Title 3—

The President

Memorandum of June 8, 2009

Delegation of Certain Functions Under Section 201 of Public Law 110–429

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, I hereby delegate to you all functions conferred upon the President by subsections (a), (b), and (c) of section 201 of Public Law 110–429. You will exercise these functions in coordination with the Secretary of Defense.

You are authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, June 8, 2009

[FR Doc. E9–14415
Filed 6–17–09; 8:45 am]
Billing code 4710–10–P

Presidential Documents

Presidential Determination No. 2009–20 of June 12, 2009

Presidential Determination for the Kingdom of Cambodia Under Section 2(b)(2) of the Export-Import Bank Act of 1945, as amended

Memorandum for the Secretary of State

Pursuant to the authority vested in me by section 2(b)(C) of the Export-Import Bank Act of 1945, as amended (12 U.S.C. 635(b)(2)(C)), I hereby determine that the Kingdom of Cambodia has ceased to be a Marxist-Leninist country within the definition of such term in section 2(b)(2)(B)(i) of that Act.

You are authorized and directed to publish this determination in the *Federal Register*.

THE WHITE HOUSE,
Washington, June 12, 2009

[FR Doc. E9–14494
Filed 6–17–09; 8:45 am]
Billing code 4710–10–P

Presidential Documents

Presidential Determination No. 2009–21 of June 12, 2009

Presidential Determination for the Lao People's Democratic Republic Under Section 2(b)(2) of the Export-Import Bank Act of 1945, as amended

Memorandum for the Secretary of State

Pursuant to the authority vested in me by section 2(b)(C) of the Export-Import Bank Act of 1945, as amended (12 U.S.C. 635(b)(2)(C)), I hereby determine that The Lao People's Democratic Republic has ceased to be a Marxist-Leninist country within the definition of such term in section 2(b)(2)(B)(i) of that Act.

You are authorized and directed to publish this determination in the *Federal Register*.

THE WHITE HOUSE,
Washington, June 12, 2009

[FR Doc. E9–14495
Filed 6–17–09; 8:45 am]
Billing code 4710–10–P

Rules and Regulations

Federal Register
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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916 and 917

[Doc. No. AMS–FV–09–0013; FV09–916/917–2 IFR]

Nectarines and Peaches Grown in California; Decreased Assessment Rates

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule decreases the assessment rates established for the Nectarine Administrative Committee and the Peach Commodity Committee (Committees) for the 2009–10 and subsequent fiscal periods. The Nectarine Administrative Committee (NAC) program decreased its assessment rate from $0.06 to $0.0175 per 25-pound container or container equivalent of nectarines handled. The Peach Commodity Committee (PCC) program decreased its assessment rate from $0.06 to $0.0025 per 25-pound container or container equivalent of peaches handled. The Committees locally administer the marketing orders which regulate the handling of nectarines and peaches grown in California. Assessments upon nectarine and peach handlers are used by the Committees to fund reasonable and necessary expenses of the programs. The fiscal periods run from March 1 through the last day of February. The assessment rates will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective June 19, 2009. Comments received by August 17, 2009, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or Internet: *http://www.regulations.gov.* Comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov.* All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Jennifer Garcia, Marketing Specialist, or Kurt Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906; or E-mail: *Jennifer.Garcia@ams.usda.gov* or *Kurt.Kimmel@ams.usda.gov.*

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Jay.Guerber@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order Nos. 916 and 917, both as amended (7 CFR parts 916 and 917), regulating the handling of nectarines and peaches grown in California, respectively, hereinafter referred to as the ''orders.'' The orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing orders now in effect, California nectarine and peach handlers are subject to assessments. Funds to administer the orders are derived from such assessments. It is intended that the assessment rates as issued herein will be applicable to all assessable nectarines and peaches beginning on March 1, 2009, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule decreases the assessment rates established for the NAC program for the 2009–10 and subsequent fiscal periods from $0.06 to $0.0175 per 25-pound container or container equivalent of nectarines and for the PCC program for the 2009–10 and subsequent fiscal periods from $0.06 to $0.0025 per 25-pound container or container equivalent of peaches.

The nectarine and peach marketing orders provide authority for the Committees, with the approval of USDA, to formulate annual budgets of expenses and collect assessments from handlers to administer the programs. The members of NAC and PCC are producers of California nectarines and peaches, respectively. They are familiar with the Committees' needs, and with the costs for goods and services in their local area and are, therefore, in a position to formulate appropriate budgets and assessment rates. The assessment rates are formulated and discussed in public meetings. Thus, all directly affected persons have an

opportunity to participate and provide input.

NAC Assessment and Expenses

For the 2009–10 and subsequent fiscal periods, the NAC recommended, and USDA approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The NAC met on February 19, 2009, and unanimously recommended 2009–10 expenditures of $1,797,290.20 and an assessment rate of $0.0175 per 25-pound container or container equivalent of nectarines. In comparison, the budgeted expenditures for the 2008–09 fiscal period were $1,660,543. The assessment rate of $0.0175 per 25-pound container or container equivalent of nectarines is $0.0425 lower than the rate currently in effect. The NAC recommended a lower assessment rate to reduce the current reserve. The NAC also recommended a decrease in promotional activities for 2009.

The major expenditures recommended by the NAC for the 2009–10 fiscal period include $319,965.32 for administration, $349,447.55 for production research, and $1,127,877.33 for domestic and international programs (promotional activities). In comparison, budgeted expenses for these items in 2008–09 were $330,025 for administration, $225,678 for production research, $1,071,574 for domestic and international programs and $33,266 for inspection and compliance activities.

The NAC 2009–10 fiscal period assessment rate was derived after considering anticipated fiscal period expenses; estimated assessable nectarines of 20,000,000 25-pound containers or container equivalents; the estimated income from other sources, such as interest; and the need for an adequate financial reserve to carry the NAC into the 2010–11 fiscal period. Therefore, the NAC recommended an assessment rate of $0.0175 per 25-pound container or container equivalent.

Combining expected assessment revenue of $350,000.00 with the $1,071,398.90 carryover available from the 2008–09 fiscal period and other income of $930,911, which includes interest and grants, should be adequate to meet Committee needs. The assessment rate is expected to decrease the reserve to $205,019.70, which may be used to cover administrative expenses prior to the beginning of the 2010–11 shipping season as provided in the order (§ 916.42).

PCC Assessment and Expenses

For the 2009–10 and subsequent fiscal periods, the PCC recommended, and USDA approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The PCC met on February 19, 2009, and recommended 2009–10 expenditures of $1,885,250 and an assessment rate of $0.0025 per 25-pound container or container equivalent of peaches. In comparison, budgeted expenditures for the 2008–09 fiscal period were $1,672,090. The assessment rate of $0.0025 per 25-pound container or container equivalent of peaches is $0.0575 lower than the rate currently in effect. The PCC recommended a lower assessment rate to reduce the current reserve. The PCC also recommended a decrease in promotional activities for 2009.

The major expenditures recommended by the PCC for the 2009–10 fiscal period include $334,058 for administration, $366,920 for production research, and $1,184,272 for domestic and international programs. In comparison, budgeted expenses for these items in 2008–09 were $348,078 for administration, $4,029 for inspection, $225,678 for production research, $1,057,078 for domestic and international programs (promotional activities), and $37,227 for inspection and compliance activities.

The PCC 2009–10 fiscal period assessment rate was derived after considering anticipated fiscal period expenses; estimated assessable peaches of 21,000,000 25-pound containers or container equivalents; the estimated income from other sources, such as interest; and the need for an adequate financial reserve to carry the PCC into the 2010–11 fiscal period. Therefore, the PCC recommended an assessment rate of $0.0025 per 25-pound container or container equivalent.

Combining expected assessment revenues of $52,500 with the $1,597,291 carryover available from the 2008–09 fiscal period and other income of $614,276, which includes interest and grants, should be adequate to meet Committee needs. The assessment rate is expected to decrease the reserve to $326,317, which may be used to cover administrative expenses prior to the beginning of the 2010–11 shipping season as provided in the order (§ 917.38).

Continuing Assessment Rates

The assessment rates established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committees or other available information.

Although these assessment rates are in effect for an indefinite period, the Committees will continue to meet prior to or during each fiscal period to recommend budgets of expenses and consider recommendations for modification of the assessment rates. The dates and times of Committee meetings are available from the Committees' Web site at *http://www.eatcaliforniafruit.com* or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate the Committees' recommendations and other available information to determine whether modification of the assessment rate for each Committee is needed. Further rulemaking will be undertaken as necessary. The Committees' 2009–10 fiscal period budgets and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA)(5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 120 California nectarine and peach handlers subject to regulation under the orders covering nectarines and peaches grown in California, and about 550 producers of these fruits in California. Small agricultural service firms, which include handlers, are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those whose annual receipts are less than $7,000,000. Small agricultural producers are defined by the SBA as those having annual receipts

of less than $750,000. A majority of these handlers and producers may be classified as small entities.

The Committees' staff has estimated that there are fewer than 30 handlers in the industry who would not be considered small entities. For the 2008 season, the Committees' staff estimated that the average handler price received was $9.00 per container or container equivalent of nectarines or peaches. A handler would have to ship at least 777,778 containers to have annual receipts of $7,000,000. Given data on shipments maintained by the Committees' staff and the average handler price received during the 2008 season, the Committees' staff estimates that small handlers represent approximately 78 percent of all the handlers within the industry.

The Committees' staff has also estimated that fewer than 60 producers in the industry would not be considered small entities. For the 2008 season, the Committees estimated the average producer price received was $4.25 per container or container equivalent for nectarines and peaches. A producer would have to produce at least 176,471 containers of nectarines and peaches to have annual receipts of $750,000. Given data maintained by the Committees' staff and the average producer price received during the 2008 season, the Committees' staff estimates that small producers represent more than 88 percent of the producers within the industry.

With an average producer price of $4.25 per container or container equivalent, and a combined packout of nectarines and peaches of 45,543,561 containers, the value of the 2008 packout is estimated to be $193,560,134. Dividing this total estimated producer revenue figure by the estimated number of producers (550) yields an estimate of average revenue per producer of about $351,928 from the sales of peaches and nectarines.

The nectarine and peach marketing orders provide authority for the Committees, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the programs. The members of the NAC and PCC are producers of California nectarines and peaches, respectively.

This rule decreases the assessment rates established for the NAC for the 2009–10 and subsequent fiscal periods from $0.06 to $0.0175 per 25-pound container or container equivalent of nectarines and for the PCC for the 2009–10 and subsequent fiscal periods from $0.06 to $0.0025 per 25-pound container or container equivalent of peaches.

The NAC recommended 2009–10 fiscal period expenditures of $1,797,290.20 for nectarines and an assessment rate of $0.0175 per 25-pound container or container equivalent of nectarines. The assessment rate of $0.0175 is $0.0425 lower than the rate currently in effect. The PCC recommended 2009–10 fiscal period expenditures of $1,885,250 for peaches and an assessment rate of $0.0025 per 25-pound container or container equivalent of peaches. The assessment rate of $0.0025 is $0.0575 lower than the rate currently in effect.

Analysis of NAC Budget

The quantity of assessable nectarines for the 2009–10 fiscal period is estimated at 20,000,000 25-pound containers or container equivalents. Thus, the $0.0175 rate should provide $350,000.00 in assessment income. Income derived from handler assessments, along with income from other sources and funds from the NAC's reserve, will be adequate to cover budgeted expenses.

The major expenditures recommended by the NAC for the 2009–10 fiscal period include $319,965.32 for administration, $349,447.55 for production research, and $1,127,877.33 for domestic and international programs. Budgeted expenses in 2008–09 were $330,025 for administration, $225,678 for production research, $1,071,574 for domestic and international programs (promotional activities), and $33,266 for inspection and compliance activities.

The NAC recommended a lower assessment rate to reduce the current reserve. The NAC also recommended a decrease in promotional activities for 2009. Income generated from the lower assessment rate combined with reserve funds should be adequate to cover anticipated 2009 expenses.

Analysis of PCC Budget

The quantity of assessable peaches for the 2009–10 fiscal period is estimated at 21,000,000 25-pound containers or container equivalents. Thus, the $0.0025 rate should provide $52,500 in assessment income.

The major expenditures recommended by PCC for the 2009–10 fiscal period include $334,058 for administration, $366,920 for production research, and $1,184,272 for domestic and international programs. Budgeted expenses in 2008–09 were $348,078 for administration, $4,029 for inspection, $225,678 for production research, $1,057,078 for domestic and international programs (promotional activities), and $37,227 for inspection and compliance activities.

The PCC recommended a lower assessment rate to reduce the current reserve. The PCC also recommended a decrease in promotional activities for 2009. Income generated from the lower assessment rate combined with reserve funds should be adequate to cover anticipated 2009 expenses.

Considerations in Determining Expenses and Assessment Rates

Prior to arriving at these budgets, the Committees considered alternative expenditure and assessment rate levels, but ultimately decided that the recommended levels were reasonable to properly administer the orders.

Each of the Committees then reviewed the proposed expenses; the total estimated assessable 25-pound containers or container equivalents; and the estimated income from other sources, such as interest income, prior to recommending a final assessment rate. The NAC decided that an assessment rate of $0.0175 per 25-pound container or container equivalent will allow it to meet its 2009–10 fiscal period expenses and carryover an operating reserve of about $205,019.70 which is in line with the Committee's financial needs. The PCC decided that an assessment rate of $0.0025 per 25-pound container or container equivalent will allow it to meet its 2009–10 fiscal period expenses and carryover an operating reserve of $326,317. These assessment rates will allow them to meet their 2009–10 fiscal period expenses and carryover necessary reserves to finance operations before 2010–11 fiscal period assessments are collected.

A review of historical and preliminary information pertaining to the upcoming fiscal period indicates that the producer price for nectarines and peaches for the 2007–08 season could range between $6.00 and $8.00 per 25-pound container or container equivalent. Therefore, the estimated assessment revenue for the 2007–08 fiscal period as a percentage of total producer revenue could range between 0.04 and 0.22 percent.

This action decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate would reduce the burden on handlers, and may reduce the burden on producers. In addition, the Committees' meetings were widely publicized throughout the California nectarine and peach industries and all interested persons were invited to attend the meetings and

encouraged to participate in the Committees' deliberations on all issues. Like all Committee meetings, the February 19, 2009, meetings were public meetings and entities of all sizes were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

This action imposes no additional reporting or recordkeeping requirements on either small or large handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab.html.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2009–10 fiscal period began March 1, 2009, and the marketing orders require that the rates of assessment for each fiscal period apply to all assessable nectarines and peaches handled during such fiscal period; (2) the Committees need to have sufficient funds to pay its expenses which are incurred on a continuous basis; (3) handlers are aware of this action which was recommended by the Committees at public meetings and is similar to other assessment rate actions issued in past years; and (4) this interim final rule provides a 60-day comment period, and all comments timely received will be considered prior to finalization of this rule.

List of Subjects

7 CFR Part 916

Marketing agreements, Nectarines, Reporting and recordkeeping requirements.

7 CFR Part 917

Marketing agreements, Peaches, Pears, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR parts 916 and 917 are amended as follows:

■ 1. The authority citation for 7 CFR parts 916 and 917 continues to read as follows:

Authority: 7 U.S.C. 601–674.

PART 916—NECTARINES GROWN IN CALIFORNIA

■ 2. Section 916.234 is revised to read as follows:

§ 916.234 Assessment rate.

On and after March 1, 2009, an assessment rate of $0.0175 per 25-pound container or container equivalent of nectarines is established for California nectarines.

PART 917—PEACHES GROWN IN CALIFORNIA

■ 3. Section 917.258 is revised to read as follows:

§ 917.258 Assessment rate.

On and after March 1, 2009 an assessment rate of $0.0025 per 25-pound container or container equivalent of peaches is established for California peaches.

Dated: June 12, 2009.

Craig Morris,

Acting Associate Administrator.

[FR Doc. E9–14280 Filed 6–17–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 981

[Doc. No. AMS–FV–08–0045; FV08–981–2 IFR]

Almonds Grown in California; Revision of Outgoing Quality Control Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule revises the outgoing quality control regulations issued under the California almond marketing order (order). The order regulates the handling of almonds grown in California and is administered locally by the Almond Board of California (Board). This rule revises the term ''validation'' under the *Salmonella* bacteria (*Salmonella*) treatment program by specifying that validation data must be both submitted to and accepted by the Board's Technical Expert Review Panel (TERP) for all treatment equipment prior to its use under this program. This will help ensure that all treatment equipment meets a 4-log reduction of *Salmonella* in almonds.

DATES: Effective June 19, 2009; comments must be received by August 17, 2009.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; *Fax:* (202) 720–8938, or *Internet: http://www.regulations.gov.* Comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov.* All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Terry Vawter, Senior Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; *Telephone:* (559) 487–5901, *Fax:* (559) 487–5906, or *E-mail: Terry.Vawter@ams.usda.gov,* or *Kurt.Kimmel@ams.usda.gov.*

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; *Telephone:* (202) 720–2491, *Fax:* (202) 720–8938, or *E-mail: Jay.Guerber@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This interim final rule is issued under Marketing Order No. 981, as amended (7 CFR part 981), regulating the handling of almonds grown in California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This interim final rule revises the outgoing quality control requirements under the *Salmonella* treatment program. This rule revises the term ''validation'' by specifying that validation data must be both submitted to and accepted by the Board's TERP for all treatment equipment prior to its use under the program. The TERP consists of four scientists, with a representative from the Food and Drug Administration serving as an ex-officio member. This will help ensure that all treatment equipment meets a 4-log reduction of *Salmonella* in almonds. This action was unanimously recommended by the Board at a meeting on May 20, 2008.

Section 981.42(b) of the order provides authority for the Board to establish, with approval of the Secretary, such minimum quality and inspection requirements applicable to almonds to be handled or to be processed into manufactured product, as will contribute to orderly marketing or be in the public interest. In such crop year, no handler shall handle or process almonds into manufactured items or products unless they meet the applicable requirements as evidenced by certification acceptable to the Board. The Board, with approval of the Secretary, may establish rules and regulations necessary and incidental to the administration of this provision.

Section § 981.442(b) of the order's administrative rules and regulations provides authority for a mandatory treatment program to reduce the potential for *Salmonella* in almonds. A mandatory program went into effect in September 2007. Specifically, handlers must subject their almonds to a treatment process that achieves a minimum 4-log reduction in *Salmonella* prior to shipment. ''Log reduction'' describes how much bacteria is reduced by a treatment process. A 4-log reduction decreases bacteria by a factor of 10,000 (4 zeros). Handlers may treat almonds themselves or transport the almonds to off-site facilities for treatment. Also, handlers may ship untreated almonds to Board-approved manufacturers within the U.S., Canada, and Mexico who agree to treat the almonds appropriately. Handlers may also ship untreated almonds to locations outside the U.S., Canada, and Mexico. Containers of untreated almonds must be labeled ''unpasteurized.''

Paragraph 3 of § 981.442(b) of the regulations specifies that treatment processes must be validated by a Board-approved process authority. Paragraph (i) of that section defines the term ''validation'' to mean that the treatment technology and equipment have been demonstrated to achieve a 4-log reduction. Process authorities run tests to ensure this parameter is met. A process authority is a person who has expert knowledge of appropriate processes for the treatment of almonds and meets criteria specified in paragraph (ii) of that section.

Currently, the regulation does not specify that process authorities submit validation data to the Board's TERP in order to ensure that the treatment equipment meets the program's 4-log requirement. Thus, the Board recommended that the regulation be revised accordingly. This will help ensure that all treatment equipment meets the program's 4-log requirement. Paragraph (3)(i) of § 981.442(b) of the regulations issued under the order is revised accordingly.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 6,200 producers of almonds in the production area and approximately 100 handlers subject to regulation under the marketing order. Additionally, the Board estimates there are about 15 process authorities and 30 almond manufacturers under the *Salmonella* treatment program. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $7,000,000.

Data for the most recently-completed crop year indicate that about 50 percent of the handlers shipped under $7,000,000 worth of almonds. Dividing average almond crop value for 2006–07 reported by the National Agricultural Statistics Service of $2.258 billion by the number of producers (6,200) yields an average annual producer revenue estimate of about $364,190. Based on the foregoing, about half of the handlers and a majority of almond producers may be classified as small entities. While data regarding the size of the process authorities and almond manufacturers is not available, it may be assumed that some process authorities and manufacturers may be classified as small entities.

This rule revises § 981.442(b)(3)(i) of the order's administrative rules and regulations. This rule revises the term ''validation'' under the *Salmonella* treatment program to specify that validation data must be both submitted to and accepted by the TERP for each piece of treatment equipment prior to its use under the program. This revision will help ensure that all treatment equipment meets the program's 4-log requirement prior to its use. Authority for this action is provided in § 981.42(b) of the order.

Regarding the overall impact of this action on affected entities, it is expected to be minimal. Validation data is

already submitted to the Board's TERP for review. This action simply specifies that such data must be accepted by the TERP for all treatment equipment prior to its use under the program.

The Board's Food Quality and Safety Committee (committee) met on April 22, 2008, to consider this change. The committee considered maintaining the status quo whereby equipment could be used under the program that had completed validation testing, but had not been accepted by the TERP. The committee concluded that acceptance by the TERP was important in order to help ensure that all treatment equipment consistently meets the 4-log requirement of the program. The Board agreed with the committee and ultimately recommended that the term ''validation'' be revised accordingly.

This action does not impose any additional reporting and recordkeeping requirements on California almonds handlers, process authorities, or almond manufacturers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

Further, the committee and Board meetings where this issue was discussed were widely publicized throughout the California almond industry and all interested persons were invited to attend the meetings and participate in deliberations on all issues. The issue was discussed at two committee meetings in April 2008 and at two Board meetings, one in April and one in May 2008. All of these meetings were public meetings, and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide*. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on a revision to the outgoing quality control requirements currently prescribed under the almond marketing order. Any comments received will be considered prior to finalization of this rule.

After consideration of all relevant material presented, including the Board's recommendation, and other information, it is found that this interim final rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) This rule makes a revision to the requirements concerning validation contained in the current regulations to help ensure that all treatment equipment meets a 4-log reduction in *Salmonella* in almonds; (2) handlers are aware of this action since the Board unanimously recommended this revision at a public meeting, and interested parties had an opportunity to provide input; and (3) this rule provides a 60-day comment period and any comments received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 981

Almonds, Marketing agreements, Nuts, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 981 is amended as follows:

PART 981—ALMONDS GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 981 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Paragraph (b)(3)(i) in § 981.442 is revised to read as follows:

§ 981.442 Quality control.

* * * * *

(b) * * *

(3) * * *

(i) Validation means that the treatment technology and equipment have been demonstrated to achieve in total a minimum 4-log reduction of *Salmonella* bacteria in almonds. Validation data prepared by a Board-approved process authority must be submitted to and accepted by the TERP for each piece of equipment used to treat almonds prior to its use under the program.

* * * * *

Dated: June 12, 2009.

Craig Morris,

Acting Associate Administrator.

[FR Doc. E9–14281 Filed 6–17–09; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

[Docket No. FDA–2009–N–0665]

Oral Dosage Form New Animal Drugs; Toceranib

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect the original approval of a new animal drug application (NADA) filed by Pharmacia & Upjohn Co., a Division of Pfizer, Inc. The NADA provides for the veterinary prescription use of toceranib phosphate tablets in dogs for treatment of recurrent, cutaneous mast cell tumors.

DATES: This rule is effective June 18, 2009.

FOR FURTHER INFORMATION CONTACT: Melanie R. Berson, Center for Veterinary Medicine (HFV–110), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8337, email: *melanie.berson@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Pharmacia & Upjohn Co., a Division of Pfizer, Inc., 235 East 42d St., New York, NY 10017, filed NADA 141–295 that provides for veterinary prescription use of PALLADIA (toceranib phosphate) Tablets in dogs for the treatment of Patnaik grade II or III, recurrent, cutaneous mast cell tumors with or without regional lymph node involvement. The NADA is approved as of May 22, 2009, and the regulations are amended in 21 CFR part 520 to reflect the approval.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm.

1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(i)), this approval qualifies for 5 years of marketing exclusivity beginning on the date of approval.

FDA has determined under 21 CFR 25.33 that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 520

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is amended as follows:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: 21 U.S.C. 360b.

■ 2. Add § 520.2475 to read as follows:

§ 520.2475 Toceranib.

(a) *Specifications*. Each tablet contains 10, 15, or 50 milligrams (mg) toceranib as toceranib phosphate.

(b) *Sponsor*. See No. 000009 in § 510.600 of this chapter.

(c) *Conditions of use*—(1) *Dogs*—(i) *Amount*. Administer an initial dose of 3.25 mg per kilogram (1.48 mg per pound) body weight, orally every other day.

(ii) *Indications for use*. For the treatment of Patnaik grade II or III, recurrent, cutaneous mast cell tumors with or without regional lymph node involvement.

(iii) *Limitations*. Federal law restricts this drug to use by or on the order of a licensed veterinarian.

(2) [Reserved].

Dated: June 12, 2009.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. E9–14299 Filed 6–17–09; 8:45 am]

BILLING CODE 4160–01–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 55

[OAR–2004–0091; FRL–8912–7]

Outer Continental Shelf Air Regulations Consistency Update for California

AGENCY: Environmental Protection Agency (''EPA'').

ACTION: Final rule—consistency update.

SUMMARY: EPA is finalizing the update of the Outer Continental Shelf (''OCS'') Air Regulations proposed in the **Federal Register** on March 17, 2009. Requirements applying to OCS sources located within 25 miles of states' seaward boundaries must be updated periodically to remain consistent with the requirements of the corresponding onshore area (''COA''), as mandated by section 328(a)(1) of the Clean Air Act Amendments of 1990 (''the Act''). The portion of the OCS air regulations that is being updated pertains to the requirements for OCS sources for which the Ventura County Air Pollution Control District (Ventura County APCD) is the designated COA. The intended effect of approving the requirements contained in the ''Ventura County Air Pollution Control District Requirements Applicable to OCS Sources'' (May 2009) is to regulate emissions from OCS sources in accordance with the requirements onshore.

DATES: *Effective Date:* This rule is effective on July 20, 2009.

The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of July 20, 2009.

ADDRESSES: EPA has established docket number OAR–2004–0091 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.*, copyrighted material), and some may not be publicly available in either location (*e.g.*, CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Cynthia G. Allen, Air Division, U.S. EPA Region IX, (415) 947–4120, *allen.cynthia@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, the terms ''we,'' ''us,'' or ''our'' refer to U.S. EPA.

Organization of this document: The following outline is provided to aid in locating information in this preamble.

Table of Contents

I. Background

On March 17, 2009 (74 FR 11330), EPA proposed to approve requirements into the OCS Air Regulations pertaining to Ventura County APCD. These requirements are being promulgated in response to the submittal of rules from this California air pollution control agency. EPA has evaluated the proposed requirements to ensure that they are rationally related to the attainment or maintenance of federal or state ambient air quality standards or Part C of title I of the Act, that they are not designed expressly to prevent exploration and development of the OCS and that they are applicable to OCS sources. 40 CFR 55.1. EPA has also evaluated the rules to ensure that they are not arbitrary or capricious. 40 CFR 55.12(e). In addition, EPA has excluded administrative or procedural rules.

Section 328(a) of the Act requires that EPA establish requirements to control air pollution from OCS sources located within 25 miles of states' seaward boundaries that are the same as onshore requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into 40 CFR part 55 as they exist onshore. This limits EPA's flexibility in deciding which requirements will be incorporated into part 55 and prevents EPA from making substantive changes to the requirements it incorporates. As a result, EPA may be incorporating rules into part 55 that do not conform to all of EPA's state implementation plan (SIP) guidance or certain requirements of the Act. Consistency updates may result in the inclusion of state or local rules or regulations into part 55, even though the same rules may ultimately be disapproved for inclusion as part of the SIP. Inclusion in the OCS rule does not imply that a rule meets the requirements of the Act for SIP approval, nor does it imply that the rule will be approved by EPA for inclusion in the SIP.

II. Public Comment

EPA's proposed actions provided a 30-day public comment period. During this period, we received no comments on the proposed actions.

III. EPA Action

In this document, EPA takes final action to incorporate the proposed changes into 40 CFR part 55. No changes were made to the proposed action. EPA is approving the proposed action under section 328(a)(1) of the Act, 42 U.S.C. 7627. Section 328(a) of the Act requires that EPA establish requirements to control air pollution from OCS sources located within 25 miles of states' seaward boundaries that are the same as onshore requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into Part 55 as they exist onshore.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to establish requirements to control air pollution from OCS sources located within 25 miles of States' seaward boundaries that are the same as onshore air control requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into part 55 as they exist onshore. 42 U.S.C. 7627(a)(1); 40 CFR 55.12. Thus, in promulgating OCS consistency updates, EPA's role is to maintain consistency between OCS regulations and the regulations of onshore areas, provided that they meet the criteria of the Clean Air Act. Accordingly, this action simply updates the existing OCS requirements to make them consistent with requirements onshore, without the exercise of any policy discretion by EPA. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, nor does it impose substantial direct compliance costs on tribal governments, nor preempt tribal law.

Under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, OMB has approved the information collection requirements contained in 40 CFR part 55 and, by extension, this update to the rules, and has assigned OMB control number 2060–0249. Notice of OMB's approval of EPA Information Collection Request (''ICR'') No. 1601.06 was published in the **Federal Register** on March 1, 2006 (71 FR 10499–10500). The approval expires January 31, 2009. As EPA previously indicated (70 FR 65897–65898 (November 1, 2005)), the annual public reporting and recordkeeping burden for collection of information under 40 CFR part 55 is estimated to average 549 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9 and are identified on the form and/or instrument, if applicable. In addition, the table in 40 CFR part 9 of currently approved OMB control numbers for various regulations lists the regulatory citations for the information requirements contained in 40 CFR part 55.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 17, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 55

Environmental protection, Administrative practice and procedures, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Nitrogen oxides, Outer Continental Shelf, Ozone, Particulate matter, Permits, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: May 1, 2009.

Laura Yoshii,

Acting Regional Administrator, Region IX.

■ Title 40 of the Code of Federal Regulations, part 55, is to be amended as follows:

PART 55—[AMENDED]

■ 1. The authority citation for part 55 continues to read as follows:

Authority: Section 328 of the Clean Air Act (42 U.S.C. 7401 *et seq.*) as amended by Public Law 101–549.

■ 2. Section 55.14 is amended by revising paragraph (e)(3)(ii)(H) to read as follows:

§ 55.14 Requirements that apply to OCS sources located within 25 miles of States' seaward boundaries, by State.

* * * * *

(e) * * *

(3) * * *

(ii) * * *

(H) *Ventura County Air Pollution Control District Requirements Applicable to OCS Sources,* May, 2009.

* * * * *

■ 3. Appendix A to CFR Part 55 is amended by revising paragraph (b)(8) under the heading ''California'' to read as follows:

Appendix A to Part 55—Listing of State and Local Requirements Incorporated by Reference Into Part 55, by State

* * * * *

California

* * * * *

(b) * * *

(8) The following requirements are contained in *Ventura County Air Pollution Control District Requirements Applicable to OCS Sources:*

Rule 2 Definitions (Adopted 04/13/04)
Rule 5 Effective Date (Adopted 04/13/04)
Rule 6 Severability (Adopted 11/21/78)
Rule 7 Zone Boundaries (Adopted 06/14/77)
Rule 10 Permits Required (Adopted 04/13/04)
Rule 11 Definition for Regulation II (Adopted 03/14/06)
Rule 12 Applications for Permits (Adopted 06/13/95)
Rule 13 Action on Applications for an Authority to Construct (Adopted 06/13/95)
Rule 14 Action on Applications for a Permit to Operate (Adopted 06/13/95)
Rule 15.1 Sampling and Testing Facilities (Adopted 10/12/93)
Rule 16 BACT Certification (Adopted 06/13/95)
Rule 19 Posting of Permits (Adopted 05/23/72)
Rule 20 Transfer of Permit (Adopted 05/23/72)
Rule 23 Exemptions from Permits (Adopted 04/08/08)
Rule 24 Source Recordkeeping, Reporting, and Emission Statements (Adopted 09/15/92)
Rule 26 New Source Review—General (Adopted 03/14/06)
Rule 26.1 New Source Review—Definitions (Adopted 11/14/06)
Rule 26.2 New Source Review—Requirements (Adopted 05/14/02)
Rule 26.3 New Source Review—Exemptions (Adopted 03/14/06)
Rule 26.6 New Source Review—Calculations (Adopted 03/14/06)
Rule 26.8 New Source Review—Permit To Operate (Adopted 10/22/91)
Rule 26.10 New Source Review—PSD (Adopted 01/13/98)
Rule 26.11 New Source Review—ERC Evaluation At Time of Use (Adopted 05/14/02)
Rule 26.12 Federal Major Modifications (Adopted 06/27/06)
Rule 28 Revocation of Permits (Adopted 07/18/72)
Rule 29 Conditions on Permits (Adopted 03/14/06)
Rule 30 Permit Renewal (Adopted 04/13/04)
Rule 32 Breakdown Conditions: Emergency Variances, A., B.1., and D. only. (Adopted 02/20/79)
Rule 33 Part 70 Permits—General (Adopted 09/12/06)
Rule 33.1 Part 70 Permits—Definitions (Adopted 09/12/06)
Rule 33.2 Part 70 Permits—Application Contents (Adopted 04/10/01)
Rule 33.3 Part 70 Permits—Permit Content (Adopted 09/12/06)
Rule 33.4 Part 70 Permits—Operational Flexibility (Adopted 04/10/01)
Rule 33.5 Part 70 Permits—Time frames for Applications, Review and Issuance (Adopted 10/12/93)
Rule 33.6 Part 70 Permits—Permit Term and Permit Reissuance (Adopted 10/12/93)
Rule 33.7 Part 70 Permits—Notification (Adopted 04/10/01)
Rule 33.8 Part 70 Permits—Reopening of Permits (Adopted 10/12/93)
Rule 33.9 Part 70 Permits—Compliance Provisions (Adopted 04/10/01)
Rule 33.10 Part 70 Permits—General Part 70 Permits (Adopted 10/12/93)
Rule 34 Acid Deposition Control (Adopted 03/14/95)
Rule 35 Elective Emission Limits (Adopted 11/12/96)
Rule 36 New Source Review—Hazardous Air Pollutants (Adopted 10/06/98)
Rule 42 Permit Fees (Adopted 04/08/08)
Rule 44 Exemption Evaluation Fee (Adopted 04/08/08)
Rule 45 Plan Fees (Adopted 06/19/90)
Rule 45.2 Asbestos Removal Fees (Adopted 08/04/92)
Rule 47 Source Test, Emission Monitor, and Call-Back Fees (Adopted 06/22/99)
Rule 50 Opacity (Adopted 04/13/04)
Rule 52 Particulate Matter-Concentration (Grain Loading)(Adopted 04/13/04)
Rule 53 Particulate Matter-Process Weight (Adopted 04/13/04)
Rule 54 Sulfur Compounds (Adopted 06/14/94)
Rule 56 Open Burning (Adopted 11/11/03)
Rule 57 Incinerators (Adopted 01/11/05)
Rule 57.1 Particulate Matter Emissions from Fuel Burning Equipment (Adopted 01/11/05)
Rule 62.7 Asbestos—Demolition and Renovation (Adopted 09/01/92)
Rule 63 Separation and Combination of Emissions (Adopted 11/21/78)
Rule 64 Sulfur Content of Fuels (Adopted 04/13/99)
Rule 67 Vacuum Producing Devices (Adopted 07/05/83)
Rule 68 Carbon Monoxide (Adopted 04/13/04)
Rule 71 Crude Oil and Reactive Organic Compound Liquids (Adopted 12/13/94)
Rule 71.1 Crude Oil Production and Separation (Adopted 06/16/92)
Rule 71.2 Storage of Reactive Organic Compound Liquids (Adopted 09/26/89)
Rule 71.3 Transfer of Reactive Organic Compound Liquids (Adopted 06/16/92)
Rule 71.4 Petroleum Sumps, Pits, Ponds, and Well Cellars (Adopted 06/08/93)
Rule 71.5 Glycol Dehydrators (Adopted 12/13/94)
Rule 72 New Source Performance Standards (NSPS) (Adopted 09/9/08)
Rule 73 National Emission Standards for Hazardous Air Pollutants (NESHAPS (Adopted 09/9/08)
Rule 74 Specific Source Standards (Adopted 07/06/76)
Rule 74.1 Abrasive Blasting (Adopted 11/12/91)
Rule 74.2 Architectural Coatings (Adopted 11/13/01)
Rule 74.6 Surface Cleaning and Degreasing (Adopted 11/11/03—effective 07/01/04)
Rule 74.6.1 Batch Loaded Vapor Degreasers (Adopted 11/11/03—effective 07/01/04)
Rule 74.7 Fugitive Emissions of Reactive Organic Compounds at Petroleum Refineries and Chemical Plants (Adopted 10/10/95)
Rule 74.8 Refinery Vacuum Producing Systems, Waste-water Separators and Process Turnarounds (Adopted 07/05/83)
Rule 74.9 Stationary Internal Combustion Engines (Adopted 11/08/05)
Rule 74.10 Components at Crude Oil Production Facilities and Natural Gas Production and Processing Facilities (Adopted 03/10/98)
Rule 74.11 Natural Gas-Fired Residential Water Heaters-Control of NO_x (Adopted 04/09/85)
Rule 74.11.1 Large Water Heaters and Small Boilers (Adopted 09/14/99)
Rule 74.12 Surface Coating of Metal Parts and Products (Adopted 04/08/08)
Rule 74.15 Boilers, Steam Generators and Process Heaters (Adopted 11/08/94)
Rule 74.15.1 Boilers, Steam Generators and Process Heaters (Adopted 06/13/00)
Rule 74.16 Oil Field Drilling Operations (Adopted 01/08/91)
Rule 74.20 Adhesives and Sealants (Adopted 01/11/05)
Rule 74.23 Stationary Gas Turbines (Adopted 1/08/02)
Rule 74.24 Marine Coating Operations (Adopted 11/11/03)
Rule 74.24.1 Pleasure Craft Coating and Commercial Boatyard Operations (Adopted 01/08/02)
Rule 74.26 Crude Oil Storage Tank Degassing Operations (Adopted 11/08/94)
Rule 74.27 Gasoline and ROC Liquid Storage Tank Degassing Operations (Adopted 11/08/94)
Rule 74.28 Asphalt Roofing Operations (Adopted 05/10/94)
Rule 74.30 Wood Products Coatings (Adopted 06/27/06)
Rule 75 Circumvention (Adopted 11/27/78)

Rule 101 Sampling and Testing Facilities (Adopted 05/23/72)
Rule 102 Source Tests (Adopted 04/13/04)
Rule 103 Continuous Monitoring Systems (Adopted 02/09/99)
Rule 154 Stage 1 Episode Actions (Adopted 09/17/91)
Rule 155 Stage 2 Episode Actions (Adopted 09/17/91)
Rule 156 Stage 3 Episode Actions (Adopted 09/17/91)
Rule 158 Source Abatement Plans (Adopted 09/17/91)
Rule 159 Traffic Abatement Procedures (Adopted 09/17/91)
Rule 220 General Conformity (Adopted 05/09/95)
Rule 230 Notice to Comply (Adopted 9/9/08)

[FR Doc. E9–13603 Filed 6–17–09; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 74, No. 116
Thursday, June 18, 2009

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

June 15, 2009.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Agricultural Marketing Service

Title: Application for Plant Variety Protection Certificate and Objective Description of Variety.

OMB Control Number: 0581–0055.

Summary of Collection: The Plant Variety Protection Act (PVPA) (December 24, 1970; 84 Stat. 1542, 7 U.S.C. 2321 *et seq.*) was established to encourage the development of novel varieties of sexually-reproduced plants and make them available to the public, providing intellectual property rights (IPR) protection to those who breed, develop, or discover such novel varieties, and thereby promote progress in agriculture in the public interest. The PVPA is a voluntary user funded program that grants intellectual property ownership rights to breeders of new and novel seed-and-tuber-reproduced plant varieties. To obtain these rights the applicant must provide information that shows the variety is eligible for protection and that it is indeed new, distinct, uniform, and stable, as the law requires. Applicants are provided with applications to identify the information that is required to issue a certificate of protection.

Need and Use of the Information: The Agricultural Marketing Service will collect information from the applicant to be evaluated by examiners to determine if the variety is eligible for protection under the PVPA. If this information were not collected there will be no basis for issuing certificate of protection, and no way for applicants to request protection.

Description of Respondents: Business or other for-profit; not-for-profit institutions; Federal Government.

Number of Respondents: 85.

Frequency of Responses: Reporting: On occasion; other (varies).

Total Burden Hours: 2,080.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E9–14334 Filed 6–17–09; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

June 15, 2009.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Utilities Service

Title: 7 CFR 1730, Review Rating Summary.

OMB Control Number: 0572–0025.

Summary of Collection: The Rural Utilities Service (RUS) manages loan programs in accordance with the Rural

Electrification Act (RE Act) of 1936, 7 U.S.C. 901 *et seq.,* as amended. An important part of safeguarding loan security is to see that RUS financed facilities are being responsible used, adequately operated, and adequately maintained. Future needs have to be anticipated to ensure that facilities will continue to produce revenue and loans will be repaid as required by the RUS mortgage. Regular periodic operations and maintenance (O&M) review can identify and correct inadequate O&M practices before they cause extensive harm to the system. Inadequate O&M practices can result in public safety hazards, increased power outages for consumers, added expense for emergency maintenance, and premature aging of the borrower's systems, which could increase the loan security risk to RUS.

Need and Use of the Information: RUS will collect information using form 300 Review Rate Summary to identity items that may be in need of additional attention; to plan corrective actions when needed; to budget funds and manpower for needed work; and to initiate ongoing programs as necessary to avoid or minimize the need for ''catch-up'' programs.

Description of Respondents: Not-for-profit institutions; business or other for-profit.

Number of Respondents: 229.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 916.

Rural Utilities Service

Title: Operating Reports for Telecommunications and Broadband Borrowers.

OMB Control Number: 0572–0031.

Summary of Collection: The Rural Utilities Service's (RUS) is a credit agency of the Department of Agriculture. The Rural Electrification Act of 1936, as amended (RE Act) (7 U.S.C. 901 *et seq.*) authorizes the Secretary to make mortgage loans and loan guarantees to finance electric, telecommunications, broadband, and water and waste facilities in rural areas. In addition to providing loans and loan guarantees, one of RUS' main objectives is to safeguard loan security until the loan is repaid. The RE Act also authorizes the Secretary to make studies, investigations, and reports concerning the progress of borrowers' furnishing of adequate telephone service and publish and disseminate this information.

Need and Use of the Information: Information from the Operating Report for both telecommunication and broadband borrowers provides RUS with vital financial information needed to ensure the maintenance of the security for the Government's loans and service data which enables RUS to ensure the provision of quality telecommunications and broadband service as mandated by the RE Act of 1936. Form 674, ''Certificate of Authority to Submit or Grant Access to Data'' will allow telecommunication and broadband borrowers to file electronic Operating Reports with the agency using the new USDA Data Collection System. Accompanied by a Board Resolution, it will identify the name and USDA eAuthentication ID for a certifier and security administrator that will have access to the system for purposes of filing electronic Operating Reports.

Description of Respondents: Business or other for-profit; not-for-profit institutions.

Number of Respondents: 600.

Frequency of Responses: Reporting: On occasion; quarterly; annually.

Total Burden Hours: 2,806.

Rural Utility Service

Title: 7 CFR 1773, Policy on Audits of RUS Borrowers.

OMB Control Number: 0572–0095.

Summary of Collection: Under the authority of the Rural Electrification Act of 1936 (ACT), as amended 7 U.S.C. 901 *et seq.,* the Administrator is authorized and empowered to make loans under certain specified circumstances for the purpose of furnishing and improving telephone service in rural areas. RUS, in representing the Federal Government as Mortgagee, relies on the information provided by the borrowers in their financial statements to make lending decisions as to borrowers' credit worthiness and to assure that loan funds are approved, advanced and disbursed for proper Act purposes. Borrowers are required to furnish a full and complete report of their financial condition, operations and cash flows, in form and substance satisfactory to RUS.

Need and Use of the Information: RUS will collect information to evaluate borrowers' financial performance, determine whether current loans are at financial risk, and determine the credit worthiness of future losses. If information were not collected, it would delay RUS' analysis of the borrowers' financial strength, thereby adversely impacting current lending decisions.

Description of Respondents: Not-for-profit institutions; business or other for-profit.

Number of Respondents: 1,250.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 13,927.

Rural Utilities Service

Title: 7 CFR 1744–E, Borrower Investments—Telecommunications Loan Program.

OMB Control Number: 0572–0098.

Summary of Collection: The Rural Economic Development Act of 1990, Title XXIII of the Farm Bill, Public Law 101–624, authorized qualified Rural Utilities Service (RUS) borrowers to make investments in rural development projects without the prior approval of the RUS Administrator, provided, however that such investments do not cause the borrower to exceed its allowable qualified investment level as determined in accordance with the procedures set forth in 7 CFR Part 1744, Subpart E. RUS requests that the borrower submit (1) A description of the rural development project and type of investment; (2) a reasonable estimate of the amount the borrower is committed to provide to the project including future expenditures; and (3) a pro forma balance sheet and cash flow statement for the period covering the borrower's future commitments to determine that the *''Excess''* or proposed *''Excess''* investments will not impair the borrower's ability to repay the loan or cause financial hardship.

Need and Use of the Information: RUS will collect information to consider whether or not to approve a borrower's request to make an investment in a rural development project when such an investment would cause the borrower to exceed its allowable investment level. If this information was not collected, RUS could not thoroughly assess the economic impact of such an investment.

Description of Respondents: Business or other for-profit; not-for-profit institutions.

Number of Respondents: 2.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 1.

Rural Utilities Service

Title: Use of Consultants Funded by Borrowers, 7 CFR 1789.

OMB Control Number: 0572–0115.

Summary of Collection: The Rural Utilities Service (RUS) is a credit agency of the Department of Agriculture that makes mortgage loans and loan guarantees to finance electric, telecommunications, and water and waste facilities in rural areas. The loan programs are managed in accordance with the Rural Electrification Act (RE Act) of 1936, 7 U.S.C. 901 *et seq.,* as amended, and as prescribed by Office of Management and Budget Circular A–129, Policies for Federal Credit Programs and Non-Tax Receivable,

which states that agencies must, based on a review of a loan application, determine that an applicant complies with statutory, regulatory, and administrative eligibility requirements for loan assistance. RUS has the authority to use consultants voluntarily funded by borrowers for financial, legal, engineering, and other technical services. However, all RUS borrowers are eligible to fund consultant services but are not required to fund consultants.

Need and Use of the Information: RUS will collect information to determine whether it is appropriate to use a consultant voluntarily funded by the borrower to expedite a particular borrower application. If the information were not submitted, RUS would be unable to determine if using a consultant would accelerate the specific application process.

Description of Respondents: Not-for-profit institutions; business or other for-profit.

Number of Respondents: 1.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 2.

Rural Utilities Service

Title: 7 CFR 1728, Electric Standards and Specifications for Materials and Construction.

OMB Control Number: 0572–0131.

Summary of Collection: The Rural Electrification Act of 1936, 7 U.S.C. 901 *et seq.,* as amended, (RE Act) in Sec. 4 (7 U.S.C. 904) authorizes and empowers the Administrator of the Rural Utilities Service (RUS) to make loans in the several States and Territories of the United States for rural electrification and the furnishing and improving of electric energy to persons in rural areas. RUS' Administrator is authorized to provide financial assistance to borrowers for purposes provided in the RE Act by guaranteeing loans made by the National Rural Utilities Cooperative Finance Corporation, the Federal Financing Bank, and other lending agencies. These loans are for a term of up to 35 years and are secured by a first mortgage on the borrower's electric system. Manufacturers, wishing to sell their products to RUS electric borrowers, request RUS consideration for acceptance of their products and submit letters of request with certifications as to the origin of manufacture of the products and include certified data demonstrating their products' compliance with RUS specifications.

Need and Use of the Information: RUS will collect information to evaluate the data to determine that the quality of the products is acceptable and that their use will not jeopardize loan security. The information is closely reviewed to be certain that test data; product dimensions and product material compositions fully comply with RUS technical standards and specifications that have been established for the particular product. Without this information, RUS has no means of determining the acceptability of products for use in the rural environment.

Description of Respondents: Business or other for-profit.

Number of Respondents: 38.

Frequency of Responses: Reporting: on occasion.

Total Burden Hours: 2,000.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E9–14335 Filed 6–17–09; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Black Hills National Forest Advisory Board

AGENCY: Office of the Secretary, USDA.

ACTION: Notice of intent to renew the charter of the Black Hills National Forest Advisory Board.

SUMMARY: The Department of Agriculture is proposing to renew the charter of the Black Hills National Forest Advisory Board (the Board) to obtain advice and recommendations on a broad range of forest issues such as forest plan revisions or amendments, travel management, forest monitoring and evaluation, recreation fees, and site-specific projects having forest-wide implications.

FOR FURTHER INFORMATION CONTACT: Frances Reynolds, Legislative Affairs, Rocky Mountain Region, Forest Service, (303) 275–5357. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (5 U.S.C. App. II), notice is hereby given that the U.S. Department of Agriculture, Forest Service, intends to renew the charter of the Black Hills National Forest Advisory Board. The Board provides advice and recommendations on a broad range of forest planning issues and in accordance with the Federal Lands Recreation Enhancement Act more specifically will provide advice and recommendations on Black Hills National Forest recreation fee issues. The Board membership consists of individuals representing commodity interests, amenity interests, and State and local government.

The Black Hills National Forest Advisory Board has been determined to be in the public interest in connection with the duties and responsibilities of the Black Hills National Forest. National forest management requires improved coordination among the interests and governmental entities responsible for land management decisions and the public that the agency serves. The Board consists of 16 members that are representative of the following interests (this membership closely follows the membership outlined by the Secure Rural Schools and Community Self Determination Act for Resource Advisory Committees (16 U.S.C. 500, *et seq.*)):

1. Economic development;
2. Developed outdoor recreation, off-highway vehicle users, or commercial recreation;
3. Energy and mineral development;
4. Commercial timber industry;
5. Permittee (grazing or other land use within the Black Hills area);
6. Nationally recognized environmental organizations;
7. Regionally or locally recognized environmental organizations;
8. Dispersed recreation;
9. Archeology or history;
10. Nationally or regionally recognized sportsmen's groups, such as anglers or hunters;
11. South Dakota state-elected offices;
12. Wyoming state-elected offices;
13. South Dakota or Wyoming county- or local-elected officials;
14. Tribal government elected or-appointed officials;
15. South Dakota State natural resource agency official; and
16. Wyoming State natural resource agency officials.

The Board members determine chair responsibility. The Forest Supervisor of the Black Hills National Forest serves as the designated Federal official under sections 10(e) and (f) of the Federal Advisory Committee Act (5 U.S.C. App. II).

Equal opportunity practices are followed in all appointments to advisory committees. To ensure that the recommendations of the Board have taken into account the needs of diverse groups the Black Hills National Forest serves, membership will include to the extent practicable individuals with demonstrated ability to represent monitories, women, and persons with disabilities.

Dated: June 11, 2009.

Pearlie Reed,

Assistant Secretary of Administration.

[FR Doc. E9–14320 Filed 6–17–09; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

International Trade Administration

(A–570–851)

Certain Preserved Mushrooms from the People's Republic of China: Final Results of Antidumping Duty New Shipper Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On April 1, 2009, the Department of Commerce (the Department) published in the **Federal Register** the preliminary results of these new shipper reviews of the antidumping duty order on certain preserved mushrooms from the People's Republic of China (PRC) for Zhangzhou Gangchang Canned Foods Co., Ltd., Fujian (Zhangzhou Gangchang) and Zhejiang Iceman Group Co., Ltd. (Zhejiang Iceman). *See Certain Preserved Mushrooms From the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Reviews*, 74 FR 14772 (April 1, 2009) (*Preliminary Results*). We gave interested parties an opportunity to comment on the *Preliminary Results*, and received no comments. We also made no changes to the *Preliminary Results*. Therefore, the final results do not differ from the *Preliminary Results*.

EFFECTIVE DATE: June 18, 2009.

FOR FURTHER INFORMATION CONTACT: Tyler Weinhold, Fred Baker, or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–1121, (202) 482–2924 or (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION: We published the *Preliminary Results* for these new shipper reviews on April 1, 2009. In the *Preliminary Results*, the Department stated that interested parties were to submit case briefs within 30 days of publication of the *Preliminary Results* and rebuttal briefs within five days after the due date for filing case briefs. *See Preliminary Results* at 14778. No interested party submitted a case or rebuttal brief.

Period of Review

The period of review (POR) is February 1, 2008, through July 31, 2008.

Scope of the Order

The products covered by this order are certain preserved mushrooms, whether imported whole, sliced, diced, or as stems and pieces. The certain preserved mushrooms covered under this order are the species Agaricus bisporus and Agaricus bitorquis. ''Certain Preserved Mushrooms'' refers to mushrooms that have been prepared or preserved by cleaning, blanching, and sometimes slicing or cutting. These mushrooms are then packed and heated in containers including, but not limited to, cans or glass jars in a suitable liquid medium, including, but not limited to, water, brine, butter or butter sauce. Certain preserved mushrooms may be imported whole, sliced, diced, or as stems and pieces. Included within the scope of this order are ''brined'' mushrooms, which are presalted and packed in a heavy salt solution to provisionally preserve them for further processing.[1]

Excluded from the scope of this order are the following: (1) All other species of mushroom, including straw mushrooms; (2) all fresh and chilled mushrooms, including ''refrigerated'' or ''quick blanched mushrooms'' (3) dried mushrooms; (4) frozen mushrooms; and (5) ''marinated,'' ''acidified,'' or ''pickled'' mushrooms, which are prepared or preserved by means of vinegar or acetic acid, but may contain oil or other additives.

The merchandise subject to this order is classifiable under subheadings: 2003.10.0127, 2003.10.0131, 2003.10.0137, 2003.10.0143, 2003.10.0147, 2003.10.0153 and 0711.51.0000 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Separate Rates

In proceedings involving non–market economy (NME) countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

In the *Preliminary Results*, the Department announced its determination that Zhangzhou Gangchang and Zhejiang Iceman had demonstrated their eligibility for separate rate status. We received no comments from interested parties regarding this determination. In these final results of review, we continue to find the evidence placed on the record by Zhangzhou Gangchang and Zhejiang Iceman demonstrates an absence of government control, both in law and in fact, with respect to their exports of the merchandise under review. Thus, we have determined that Zhangzhou Gangchang and Zhejiang Iceman are eligible to receive separate rates.

Changes Since the Preliminary Results

We made no changes to the *Preliminary Results*.

Final Results of Review

The Department has determined that the following margins exist for the period February 1, 2008, through July 31, 2008:

Exporter/Manufacturer	Weighted–Average Margin (Percentage)
Zhangzhou Gangchang Canned Foods Co., Ltd., Fujian	0.00
Zhejiang Iceman Group Co., Ltd.	0.00

Assessment Rates

Pursuant to these final results, the Department determined, and CBP shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions for Zhangzhou Gangchang and Zhejiang Iceman to CBP 15 days after the date of publication of these final results of new shipper reviews. Pursuant to 19 CFR 351.212(b)(1), we calculated importer–specific (or customer) *ad valorem* duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by these reviews if any importer–specific (or customer) assessment rate calculated in

[1] On June 19, 2000, the Department affirmed that ''marinated,'' ''acidified,'' or ''pickled'' mushrooms containing less than 0.5 percent acetic acid are within the scope of the antidumping duty order. *See* Recommendation Memorandum—Final Ruling of Request by Tak Fat, *et al.* for Exclusion of Certain Marinated, Acidified Mushrooms from the Scope of the Antidumping Duty Order on Certain Preserved Mushrooms from the People's Republic of China,'' dated June 19, 2000. On February 9, 2005, this decision was upheld by the United States Court of Appeals for the Federal Circuit. *See Tak Fat v. United States*, 396 F.3d 1378 (Fed. Cir. 2005).

the final results of these reviews are above *de minimis*.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of these final results of new shipper reviews for all shipments of subject merchandise by Zhangzhou Gangchang and Zhejiang Iceman, entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Tariff Act of 1930, as amended (the Tariff Act): (1) for subject merchandise produced and exported by Zhangzhou Gangchang or produced and exported by Zhejiang Iceman, the cash deposit rate will be zero; (2) for subject merchandise exported by Zhangzhou Gangchang or Zhejiang Iceman, but not manufactured by Zhangzhou Gangchang and Zhejiang Iceman, respectively, the cash deposit rate will continue to be the PRC–wide rate (*i.e.*, 198.63 percent); and (3) for subject merchandise manufactured by Zhangzhou Gangchang and Zhejiang Iceman, but exported by any party other than Zhangzhou Gangchang and Zhejiang Iceman, respectively, the cash deposit rate will be the rate applicable to the exporter. These cash deposit requirements will remain in effect until further notice.

Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

These new shipper reviews and notice are in accordance with sections 751(a)(2)(B) and 777(i)(1) of the Tariff Act and 19 CFR 351.214(h).

Dated: June 11, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–14362 Filed 6–17–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–201–805

Preliminary Results of Antidumping Duty Changed Circumstances Review: Certain Circular Welded Non–Alloy Steel Pipe and Tube From Mexico

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On October 27, 2008, the Department of Commerce (the Department) published in the **Federal Register** a notice of initiation of a changed circumstances review of the antidumping duty order on certain circular welded non–alloy steel pipe and tube (standard pipe and tube) from Mexico in order to determine whether Ternium Mexico, S.A. de C.V. (Ternium) is the successor–in-interest to Hylsa S.A. de C.V. (Hylsa) for purposes of determining antidumping duty liability. *See Notice of Initiation of Antidumping Duty Changed Circumstances Review: Circular Welded Non–Alloy Steel Pipe and Tube*, 73 FR 63682 (October 27, 2008) (*Notice of Initiation*). We have preliminarily determined that Ternium is the successor–in-interest to Hylsa for purposes of determining antidumping duty liability in this proceeding. Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: June 18, 2009.

FOR FURTHER INFORMATION CONTACT: John Drury or Brian Davis, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0195 or (202) 482–7924, respectively.

SUPPLEMENTARY INFORMATION:

Background

The Department published an antidumping duty order on standard pipe and tube from Mexico on November 2, 1992. *See Notice of Antidumping Duty Orders: Certain Circular Welded Non–Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela, and Amendment to Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Non–Alloy Steel Pipe from Korea*, 57 FR 49453 (November 2, 1992).

On September 3, 2008, Ternium filed a request for a changed circumstances review of the antidumping duty order on standard pipe and tube from Mexico (Initial Submission) claiming that Hylsa, a Mexican producer of standard pipe and tube, changed its name to Ternium. Ternium requested that the Department determine whether it is the successor–in-interest to Hylsa, in accordance with section 751(b) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.216. In its request, Ternium indicated that effective April 1, 2008, the production and sales operations of Hylsa were transferred to Ternium (the transfer).[1] In response to this request the Department initiated a changed circumstances review of the antidumping duty order on standard pipe and tube from Mexico. *See Notice of Initiation*.

On September 17, 2008, Allied Tube and Conduit (petitioner) filed a response to Ternium's Initial Submission and on September 29, 2008, Ternium responded to petitioner's September 17, 2008, filing (September 29, 2008, submission). On November 13, 2008, the Department issued a questionnaire to Ternium requesting additional information regarding Ternium's successor–in-interest changed circumstances review request. On December 9, 2008, Ternium submitted its response to the Department's questionnaire (SQR). On January 16, 2009, the Department issued a second supplemental questionnaire and on February 9, 2009, Ternium submitted its response (SSQR). On April 8, 2009, the Department issued a third supplemental questionnaire, and on April 22, 2009, Ternium submitted its response (SSSQR). In our *Notice of Initiation*, we invited interested parties to comment. We did not receive any comments other than those made by petitioner on September 17, 2008.

Scope of the Order

The products covered by this order are circular welded non–alloy steel pipes and tubes, of circular cross–section, not more than 406.4 millimeters (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized, or painted), or

[1] Prior to the reorganization effective April 1, 2008, Ternium was a holding company and did not have any production or sales operations. *See* Ternium's Initial Submission at page 2.

end finish (plain end, beveled end, threaded, or threaded and coupled). These pipes and tubes are generally known as standard pipes and tubes and are intended for the low–pressure conveyance of water, steam, natural gas, and other liquids and gases in plumbing and heating systems, air conditioning units, automatic sprinkler systems, and other related uses, and generally meet ASTM A–53 specifications.

Standard pipes and tubes may also be used for light load–bearing applications, such as for fence tubing, and as structural pipe tubing used for framing and support members for reconstruction or load–bearing purposes in the construction, shipbuilding, trucking, farm equipment, and related industries. Unfinished conduit pipe is also included in this order. All carbon steel pipes and tubes within the physical description outlined above are included within the scope of this order, except line pipe, oil country tubular goods, boiler tubing, mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished conduit. Standard pipe and tube that is dual or triple certified/stenciled that enters the United States as line pipe of a kind used for oil or gas pipelines is also not included in this order.

Imports of the products covered by this order are currently classifiable under the following Harmonized Tariff Schedule (HTS) subheadings: 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90. Although the HTS subheadings are provided for convenience and customs purposes, our written description of the scope of this order is dispositive.

Successor–in-Interest Determination

In making a successor–in-interest determination, the Department typically examines several factors including, but not limited to, changes in: (1) management, (2) production facilities, (3) supplier relationships, and (4) customer base. *See*, *e.g.*, *Notice of Final Results of Changed Circumstances Antidumping Duty Administrative Review: Polychloroprene Rubber from Japan*, 67 FR 58 (January 2, 2002); *Brass Sheet and Strip from Canada: Final Results of Antidumping Duty Administrative Review*, 57 FR 20460, 20462 (May 13, 1992). While no single factor or combination of factors will necessarily provide a dispositive indication of a successor–in-interest relationship, the Department will generally consider the new company to be the successor to the previous company if the new company's resulting operation is not materially dissimilar to that of its predecessor. *See*, *e.g.*, *Fresh and Chilled Atlantic Salmon from Norway; Final Results of Changed Circumstances Antidumping Duty Administrative Review*, 64 FR 9979 (March 1, 1999); *Industrial Phosphoric Acid from Israel; Final Results of Changed Circumstances Review*, 59 FR 6944 (February 14, 1994). Thus, if the evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the former company, the Department will accord the new company the same antidumping treatment as its predecessor. *See*, *e.g.*, *Fresh and Chilled Atlantic Salmon from Norway: Final Results of Changed Circumstances Antidumping Duty Administrative Review*, 64 FR 9979–980 (March 1, 1999).

Preliminary Results

In accordance with 19 CFR 351.221(c)(3)(i), we preliminarily determine that Ternium is the successor–in-interest to Hylsa. In its September 3, 2008, September 29, 2008, December 9, 2008, February 9, 2009, and April 22, 2009, submissions, Ternium provided evidence supporting its claim to be the successor–in-interest to Hylsa.[2] Documentation attached to Ternium's September 3, 2008, September 29, 2008, December 9, 2008, February 9, 2009, and April 22, 2009, submissions shows that the transfer of production and sales operations from Hylsa to Ternium resulted in little or no change in management, production facilities, supplier relationships, or customer base. This documentation is identified and discussed further below.

In its Initial Submission, at page 2, Ternium stated that Ternium S.A., a Luxemburg corporation (Ternium Luxemburg), acquired ownership of 99.3 percent of Hylsamex S.A. de C.V.'s (Hylsamex)[3] (and as a result, Hylsamex's subsidiary Hylsa) outstanding shares on August 22, 2005. Ternium also stated that following this acquisition, Hylsa's operating and corporate structure were reorganized in several stages, the most recent of which took effect April 1, 2008, when the production and sales operations of Hylsa were transferred to Ternium. *Id.* at page 2. Ternium also explained in its Initial Submission that the corporation now known as Ternium was a holding company that was acquired by Ternium Luxemburg in July 2007, when it acquired Grupo IMSA, SAB de C.V. (Grupo IMSA). *Id.* at page 2, footnote 1. According to Ternium, the name of that holding company was changed from Grupo IMSA to Ternium, effective December 13, 2007. *Id.* at page 2, footnote 1.

Ternium noted in its September 29, 2008 submission, at page 2, that through Ternium Luxemburg's acquisition of Grupo IMSA/Ternium, Ternium Luxemburg also acquired ownership of Grupo IMSA's subsidiary IMSA, S.A. de C.V. (IMSA). In Ternium's September 29, 2008 submission, at page 2, Ternium explained that following Ternium Luxemburg's acquisition of Grupo IMSA, Ternium Luxemburg owned two separate holding companies (*i.e.*, Hylsamex and Grupo IMSA) which each separately continued to hold the ownership of their subsidiaries (Hylsa and IMSA, respectively). Also in its September 29, 2008, submission, at page 3, Ternium stated that IMSA (1) produces little, if any, subject merchandise and (2) does not produce or market standard pipe and tube that is certified to meet ASTM specifications set for standard pipe and tube.

The Department requested information relating to Ternium Luxemburg's acquisition of Grupo IMSA (and its subsidiary IMSA) including: (1) 2006, 2007, and 2008 annual capacity and annual production data for the former IMSA facility (as well as the former Hylsa facilities) that produces subject merchandise (*see* pages 2–3 and appendix S–1 of Ternium's SSQR),[4] (2) the former IMSA facility's product brochure used by IMSA prior to the April 2008 reorganization (*see* appendix S–2 of Ternium's SQR), and (3) documentation of the change in corporate name from Grupo IMSA to Ternium (*see* Ternium's SQR at appendix S–4).

The Department also requested that Ternium provide (1) its current (as of March 2009) management chart, listing the former employers of each director/senior management personnel and (2) a pre–transfer (June 2007) Hylsa management chart. *See* Ternium's

[2] In our *Notice of Initiation*, we referred to Ternium's request as a ''name change.'' However, as explained above it is related to the transfer of production and sales functions from Hylsa to Ternium (*i.e.*, an acquisition). Effective April 1, 2008, Hylsa exists solely as a service company which employs workers at the former Hylsa facilities and provides its services to Ternium on a contract basis. *See* Ternium's Initial Submission at page 2.

[3] Hylsamex is the former parent company of Hylsa. On August 22, 2005, Ternium Luxemburg (the corporate parent of Ternium (*see* Ternium's SQR at page 10)), acquired Hylsamex. *See* Ternium's Initial Submission at page 2.

[4] According to Ternium, production of standard pipe and tube at the former IMSA facility ceased in August of 2008. *See* page 3 at footnote 1of Ternium's SSQR.

SSSQR at appendices S–2 and S–1, respectively. In reviewing the March 2009 and June 2007 management charts, we found that Ternium Luxemburg's acquisition of IMSA resulted in minimal changes to the composition of Hylsa's/Ternium's directors/senior management personnel. Specifically, with regard to the March 2009 chart, out of Ternium's 51 directors/senior management personnel, 7 are former IMSA employees, 31 are former Hylsa employees, and the remaining 13 are former employees of other Ternium Luxemburg affiliates. Thus, we preliminarily find that former Hylsa employees occupy the majority of director/senior management positions at Ternium.

Ternium presented the following documentation in support of its assertion that it is the successor–in-interest to Hylsa: (1) a copy of documentation of the acquisition of Hylsamex by Ternium Luxemburg (*see* Ternium's SQR at appendix S–5), (2) diagrams depicting Ternium Luxemburg's corporate structure throughout the different stages of its acquisition of Hylsa (*see* Ternium's Initial Submission at attachment 3–A for corporate structure as of September 30, 2006 (*i.e.*, Ternium Luxemburg's corporate structure prior to the transfer); *see also* Ternium's Initial Submission at attachment 3–D for corporate structure as of April 30, 2008 (*i.e.*, Ternium Luxemburg's corporate structure post–transfer)), (3) tables depicting the management structure of Hylsa as of June, 2007, *i.e.*, prior to the transfer (*see* Ternium's SSSQR at appendix S–1) and the current management structure of Ternium Luxemburg as of March 2009, *i.e.*, after the transfer (*see* Ternium's SSSQR at appendix S–2), (4) listings of Hylsa's suppliers of major inputs for production of subject merchandise in 2007 (*i.e.*, before the final transfer took place) and of Ternium's suppliers of inputs for production of subject merchandise in the second quarter of 2008, *i.e.*, after the transfer took effect (*see* Ternium's Initial Submission at attachment 6), (5) a list of Hylsa and Ternium facilities at which subject merchandise is or can be produced (*see* Ternium's SQR at appendix 3), (6) data on annual capacity and actual production of standard pipe and tube for 2006, 2007, and 2008 (*see* Ternium's SSQR at appendix S–1) at said facilities, and (7) listings of Hylsa's standard pipe and tube customers in the home market and United States in 2007 (prior to the transfer) and of Ternium's standard pipe and tube customers in the home market and the United States during the second quarter of 2008 (after the transfer took effect). *See* Ternium's Initial Submission at attachment 5.

We examined the diagrams depicting Ternium Luxemburg's corporate structure throughout the different stages of its acquisition of Hylsa. *See* Ternium's Initial Submission at attachment 3 for diagrams of Ternium Luxemburg's corporate structure as of (1) September 2006 (attachment 3–A), (2) September 30, 2007 (attachment 3–B), (3) December 31, 2007 (attachment 3–C), and (4) April 30, 2008 (attachment 3–D).

We reviewed tables depicting the management structure of Hylsa as of June, 2007, *i.e.*, prior to the transfer of production and sales operations from Hylsa to Ternium (*see* Ternium's SSSQR at appendix S–1), and the current management structure of Ternium as of March 2009, *i.e.*, after the transfer of Hylsa's production and sales operations (*see* Ternium's SSSQR at appendix S–2). As noted in Ternium's Initial Submission on page 2 at footnote 1, the only significant changes involve: (1) transfers of personnel from other Ternium Luxemburg affiliates, (2) the promotion of former Hylsa employees to higher positions, and (3) changes to the structure of the organization chart (*i.e.*, the creation of new positions). Based on our examination of the diagrams and tables described above, we preliminarily find that Ternium's management structure, for the most part, resembles Hylsa's prior to its acquisition by Ternium Luxemburg. *See* Ternium's SSSQR at appendices S–1 and S–2.

We also reviewed the list of major input suppliers that Ternium provided at attachment 6 of its Initial Submission. We compared Hylsa's 2007 (*i.e.*, prior to the transfer) suppliers for each input to Ternium's second quarter 2008 (*i.e.*, after the transfer) suppliers for each input. We noted no changes in suppliers between the two lists.

We examined the customer lists that Ternium provided in its Initial Submission at attachment 5. Specifically, we compared Hylsa's 2007 (*i.e.*, prior to the transfer) list of home and export market customers (including U.S. customers) for standard pipe and tube (*see* attachment 5–A) to Ternium's second quarter 2008 (*i.e.*, after the transfer) list of home and export market customers (including U.S. customers) (*see* attachment 5–B). Ternium affirmed in their SQR at page 14 and in their SSSQR at page 7, that none of the former Hylsa customers discontinued their relationship with Ternium due to the acquisition of Hylsamex by Ternium Luxemburg. The Department requested clarification as to why certain customer's appeared on Hylsa's 2007 customer list but did not appear on Ternium's second quarter 2008 customer list and *vice versa*. Ternium explained in its SSSQR at pages 6 and 7 that the customer lists in its Initial Submission at attachment 5 identified: (a) the home market and U.S. customers that actually purchased subject merchandise from Hylsa during 2007, and (b) the home market and U.S. customers that actually purchased subject merchandise from Ternium during the second quarter of 2008. In other words, the lists did not purport to reflect all of the customers that maintained relationships with Hylsa and Ternium during each period which is why several of the names on each list did not match. Ternium also explained that all former Hylsa customers were maintained as customers in Ternium's sales computer following the merger and were eligible to make purchases at any time. *See* Ternium's SSSQR at page 6. Therefore, based on record information, we preliminarily find that Ternium's customer base resembles Hylsa's prior to its acquisition by Ternium Luxemburg.

We also examined Ternium's list of production facilities that are capable of producing standard pipe and tube (including merchandise that falls within the scope of the antidumping duty order on the subject pipe and tube products) provided at appendix S–3 of their SQR. Ternium stated in its SQR at page 3 that none of the standard pipe and tube produced at the facility formerly operated by IMSA is certified to meet any ASTM standards or any other industry specifications, and as a result, are not exported to the United States. Because the former IMSA facility is limited in its abilities to produce subject merchandise that is appealing to customers in the United States, *i.e.*, not certified to meet ASTM, and its capacity to produce subject merchandise is relatively small when compared to both former Hylsa facilities, we preliminarily determine that although production facilities for standard pipe and tube have changed between pre–transfer Hylsa and post–transfer Ternium (which includes both the former Hylsa facilities and the facility formerly operated by IMSA), the post–transfer Ternium's production facilities are not so significantly different from the former Hylsa production facilities that Ternium would be precluded from being a successor to Hylsa.

The documentation and analysis thereof described above, both with regard to the transfer of production and sales operations from Hylsa to Ternium as well as Ternium Luxemburg's

acquisition of Grupo IMSA (and its subsidiary IMSA), demonstrates that there was little to no change in management structure, supplier relationships, or customer base between pre–acquisition Hylsa and post–acquisition (after the acquisitions of Hylsamex and Grupo IMSA) Ternium. For these reasons, we preliminarily find that Ternium is the successor–in-interest to Hylsa and, thus, should be accorded the same antidumping duty treatment with respect to standard pipe and tube from Mexico as Hylsa. If the above preliminary results are affirmed in the Department's final results, the cash deposit rate from this changed circumstances review will apply to all entries of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this changed circumstances review. *See Granular Polytetrafluoroethylene Resin from Italy; Final Results of Antidumping Duty Changed Circumstances Review*, 68 FR 25327 (May 12, 2003).

Public Comment

In accordance with 19 CFR 351.310(c), any interested party may request a hearing within 30 days of publication of this notice. Any hearing, if requested, will be held no later than 37 days after the date of publication of this notice, or the first workday thereafter. Case briefs from interested parties may be submitted not later than 30 days after the date of publication of this notice, in accordance with 19 CFR 351.309(c)(ii). Rebuttal briefs, limited to the issues raised in those comments, may be filed not later than 5 days after the time limit for filing the case brief, in accordance with 19 CFR 351.309(d). All written comments shall be submitted in accordance with 19 CFR 351.303. Persons interested in attending the hearing, if one is requested, should contact the Department for the date and time of the hearing. In accordance with 19 CFR 351.216(e), the Department will issue the final results of its antidumping duty changed circumstances review not later than 270 days after the date on which the review is initiated.

During the course of this antidumping duty changed circumstances review, deposit requirements for the subject merchandise exported and manufactured by Ternium will continue to be the all–others rate established in the investigation. *See Notice of Antidumping Duty Orders: Certain Circular Welded Non–Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela, and Amendment to Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Non–Alloy Steel Pipe from Korea*, 57 FR 49453 (November 2, 1992). The cash deposit rate will be altered, if warranted, pursuant only to the final results of this review.

We are issuing and publishing these preliminary results and notice in accordance with sections 751(b)(1) and 777(i)(1) and (2) of the Act and 19 CFR 351.216.

Dated: June 11, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–14366 Filed 6–17–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–405–803]

Purified Carboxymethylcellulose from Finland; Notice of Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On April 9, 2009, the Department of Commerce (the Department) published in the **Federal Register** the preliminary results of the administrative review of the antidumping duty order on purified carboxymethylcellulose from Finland. *See Purified Carboxymethylcellulose from Finland; Preliminary Results of Antidumping Duty Administrative Review*, 74 FR 16180 (April 9, 2009) (*Preliminary Results*). We gave interested parties an opportunity to comment on the *Preliminary Results*, and received no comments.

EFFECTIVE DATE: June 18, 2009.

FOR FURTHER INFORMATION CONTACT: Tyler Weinhold, or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–1121 or (202) 482–0649, respectively

SUPPLEMENTARY INFORMATION:

Background

On April 9, 2009, the Department published the preliminary results of administrative review of the antidumping duty order covering purified CMC from Finland. *See Preliminary Results.* The parties subject to this review are CP Kelco Oy and CP Kelco U.S., Inc. (collectively, CP Kelco). The petitioner in this proceeding is the Aqualon Company, a division of Hercules Incorporated (Petitioner).

In the *Preliminary Results*, the Department stated that interested parties were to submit case briefs within 30 days of publication of the *Preliminary Results* and rebuttal briefs within five days after the due date for filing case briefs. *See Preliminary Results* at 16185. No interested party submitted a case or rebuttal brief. On April 8, 2009, we issued a supplementary questionnaire to CP Kelco to address certain inconsistencies in CP Kelco's U.S. sales response. CP Kelco responded on April 14, 2009, and submitted a corrected U.S. sales database. We modified the margin calculation program used in the *Preliminary Results* in order to use CP Kelco's April 14, 2009, U.S. sales database for the final results. We made no other changes for the final results.[1]

Period of Review

The period of review (POR) is July 1, 2007, through June 30, 2008.

Scope of the Order

The merchandise covered by this order is all purified carboxymethylcellulose (CMC), sometimes also referred to as purified sodium CMC, polyanionic cellulose, or cellulose gum, which is a white to off–white, non–toxic, odorless, biodegradable powder, comprising sodium CMC that has been refined and purified to a minimum assay of 90 percent. Purified CMC does not include unpurified or crude CMC, CMC Fluidized Polymer Suspensions, and CMC that is cross–linked through heat treatment. Purified CMC is CMC that has undergone one or more purification operations which, at a minimum, reduce the remaining salt and other by–product portion of the product to less than ten percent. The merchandise subject to this order is classified in the Harmonized Tariff Schedule of the United States at subheading 3912.31.00. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope of the order is dispositive.

Final Results of Review

The Department has determined that the following margins exist for the period July 1, 2007, through June 30, 2008:

[1] In past segments of this proceeding, the Department has included the transaction fees relating to the factoring of certain comparison market and U.S. sales by CP Kelco Oy through an affiliated finance company in its dumping margin calculations. However, the Department intends to re-examine the appropriateness of including these affiliated transactions in its calculations in subsequent reviews of this proceeding.

Manufacturer / Exporter	Weighted Average Margin (percentage)
CP Kelco	12.00%

Assessment Rates

Pursuant to these final results, the Department has determined, and CBP shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions for CP Kelco to CBP 15 days after the date of publication of these final results. Pursuant to 19 CFR 351.212(b)(1), we calculated importer–specific (or customer–specific) *ad valorem* duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer–specific (or customer–specific) assessment rate calculated in the final results of this review are above *de minimis*.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003) (*Assessment of Antidumping Duties*). This clarification will apply to entries of subject merchandise during the POR produced by CP Kelco for which CP Kelco did not know the merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate un–reviewed entries at the 6.65 percent all–others rate if there is no company–specific rate for an intermediary involved in the transaction. *See Notice of Antidumping Duty Orders: Purified Carboxymethylcellulose from Finland, Mexico, the Netherlands and Sweden*, 70 FR 39734 (July 11, 2005) (*Purified Carboxymethylcellulose Orders*). *See Assessment of Antidumping Duties* for a full discussion of this clarification.

Cash Deposit Requirements

Furthermore, the following deposit requirements will be effective upon publication of these final results for all shipments of CMC from Finland entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Tariff Act: 1) the cash deposit rate for CP Kelco will be the rate established in the final results of review; 2) if the exporter is not a firm covered in this review or the less–than-fair–value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and 3) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be the all–others rate of 6.65 percent *ad valorem* from the LTFV investigation. *See Purified Carboxymethylcellulose Orders*. These deposit requirements, when imposed, shall remain in effect until further notice.

Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i) of the Tariff Act.

Dated: June 11, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–14373 Filed 6–17–09; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–836]

Preliminary Results of Antidumping Duty Changed Circumstances Review: Light–Walled Rectangular Pipe and Tube From Mexico

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On October 27, 2008, the Department of Commerce (the Department) published in the **Federal Register** a notice of initiation of a changed circumstances review of the antidumping duty order on light–walled rectangular pipe and tube (LWRPT) from Mexico in order to determine whether Ternium Mexico, S.A. de C.V. (Ternium) is the successor–in-interest to Hylsa S.A. de C.V. (Hylsa) for purposes of determining antidumping duty liability. *See Notice of Initiation of Antidumping Duty Changed Circumstances Review: Light–Walled Rectangular Pipe and Tube from Mexico*, 73 FR 63686 (October 27, 2008) (*Notice of Initiation*). We have preliminarily determined that Ternium is the successor–in-interest to Hylsa for purposes of determining antidumping duty liability in this proceeding. Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: June 18, 2009.

FOR FURTHER INFORMATION CONTACT: John Drury or Brian Davis, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0195 or (202) 482–7924, respectively.

SUPPLEMENTARY INFORMATION:

Background

The Department published the antidumping duty order of LWRPT from Mexico on August 5, 2008. *See Light–Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea (Korea): Antidumping Duty Orders; Light–Walled Rectangular Pipe and Tube from Korea: Notice of Amended Final Determination of Sales at Less Than Fair Value*, 73 FR 45403 (August 5, 2008).

On September 3, 2008, Ternium filed a request for a changed circumstances review of the antidumping duty order of LWRPT from Mexico (Initial Submission), claiming that Hylsa, a Mexican producer of LWRPT, changed its name to Ternium. Ternium requested

that the Department determine whether it is the successor–in-interest to Hylsa, in accordance with section 751(b) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.216. In its request, Ternium indicated that effective April 1, 2008, the production and sales operations of Hylsa were transferred to Ternium (the transfer).[1] In response to this request the Department initiated a changed circumstances review of the antidumping duty order of LWRPT from Mexico. *See Notice of Initiation*.

On November 13, 2008, the Department issued a questionnaire to Ternium requesting additional information regarding its successor–in-interest changed circumstances review request. On December 9, 2008, Ternium submitted its response to the Department's questionnaire (SQR). On January 16, 2009, the Department issued a second supplemental questionnaire and on February 9, 2009, Ternium submitted its response (SSQR). On April 8, 2009, the Department issued a third supplemental questionnaire, and on April 22, 2009, Ternium submitted its response (SSSQR). In our *Notice of Initiation*, we invited interested parties to comment. We did not receive any comments.

Scope of the Order

The merchandise subject to this order is certain welded carbon quality light–walled steel pipe and tube, of rectangular (including square) cross section, having a wall thickness of less than 4 mm.

The term carbon–quality steel includes both carbon steel and alloy steel which contains only small amounts of alloying elements. Specifically, the term carbon–quality includes products in which none of the elements listed below exceeds the quantity by weight respectively indicated: 1.80 percent of manganese, or 2.25 percent of silicon, or 1.00 percent of copper, or 0.50 percent of aluminum, or 1.25 percent of chromium, or 0.30 percent of cobalt, or 0.40 percent of lead, or 1.25 percent of nickel, or 0.30 percent of tungsten, or 0.10 percent of molybdenum, or 0.10 percent of niobium, or 0.15 percent vanadium, or 0.15 percent of zirconium.

The description of carbon–quality is intended to identify carbon–quality products within the scope. The welded carbon–quality rectangular pipe and tube subject to this order is currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7306.61.50.00 and 7306.61.70.60. While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this order is dispositive.

Successor–in-Interest Determination

In making a successor–in-interest determination, the Department typically examines several factors including, but not limited to, changes in: (1) management, (2) production facilities, (3) supplier relationships, and (4) customer base. *See*, *e.g.*, *Notice of Final Results of Changed Circumstances Antidumping Duty Administrative Review: Polychloroprene Rubber from Japan*, 67 FR 58 (January 2, 2002); *Brass Sheet and Strip from Canada: Final Results of Antidumping Duty Administrative Review*, 57 FR 20460, 20462 (May 13, 1992). While no single factor or combination of factors will necessarily provide a dispositive indication of a successor–in-interest relationship, the Department will generally consider the new company to be the successor to the previous company if the new company's resulting operation is not materially dissimilar to that of its predecessor. *See*, *e.g.*, *Fresh and Chilled Atlantic Salmon from Norway; Final Results of Changed Circumstances Antidumping Duty Administrative Review*, 64 FR 9979 (March 1, 1999); *Industrial Phosphoric Acid from Israel; Final Results of Changed Circumstances Review*, 59 FR 6944 (February 14, 1994). Thus, if the evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the former company, the Department will accord the new company the same antidumping treatment as its predecessor.

Preliminary Results

In accordance with 19 CFR 351.221(c)(3)(i), we preliminarily determine that Ternium is the successor–in-interest to Hylsa.[2] In its September 3, 2008, December 9, 2008, February 9, 2009, and April 22, 2009, submissions, Ternium provided evidence supporting its claim to be the successor–in-interest to Hylsa. Documentation attached to Ternium's September 3, 2008, December 9, 2008, February 9, 2009, and April 22, 2009, submissions shows that the transfer of production and sales operations from Hylsa to Ternium resulted in little or no change in management, production facilities, supplier relationships, or customer base. This documentation is identified and discussed further below.

In its Initial Submission, Ternium stated that Ternium S.A., a Luxemburg corporation (Ternium Luxemburg), acquired ownership of 99.3 percent of Hylsamex S.A. de C.V.'s (Hylsamex)[3] (and as a result, Hylsamex's subsidiary Hylsa) outstanding shares on August 22, 2005. See Ternium's Initial Submission at page 2. Ternium also stated that following this acquisition, Hylsa's operating and corporate structure were reorganized in several stages, the most recent of which took effect April 1, 2008, when the production and sales operations of Hylsa were transferred to Ternium. *Id.* at page 2. Ternium also explained in its Initial Submission that the corporation now known as Ternium was a holding company that was acquired by Ternium Luxemburg in July 2007, when it acquired Grupo IMSA, SAB de C.V. (Grupo IMSA). *Id.* at page 2. According to Ternium, the name of that holding company was changed from Grupo IMSA to Ternium, effective December 13, 2007. *Id.* at page 2. Ternium stated that through Ternium Luxemburg's acquisition of Grupo IMSA/Ternium, Ternium Luxemburg also acquired ownership of Grupo IMSA's subsidiary IMSA, S.A. de C.V. (IMSA), a producer of LWRPT. *See* Ternium's Initial Submission at page 2.

The Department requested information relating to Ternium Luxemburg's acquisition of Grupo IMSA (and its subsidiary IMSA) including: (1) 2006, 2007, and 2008 annual capacity and annual production data for the former IMSA facility (as well as the former Hylsa facilities) that produces subject merchandise (*see* pages 2–3 and appendix S–1 of Ternium's SSQR) and (2) documentation of the change in corporate name from Grupo IMSA to Ternium (*see* Ternium's SQR at appendix S–2).

The Department also requested that Ternium provide a current (as of March 2009) management chart of Ternium, listing the former employers of each director/senior management personnel as well as a pre–transfer (June 2007) Hylsa management chart. *See* Ternium's

[1] Prior to the reorganization effective April 1, 2008, Ternium was a holding company and did not have any production or sales operations. *See* Ternium's Initial Submission at page 2.

[2] In our *Notice of Initiation*, we referred to Ternium's request as a ''name change.'' However, as explained above it is related to the transfer of production and sales functions from Hylsa to Ternium (*i.e.*, an acquisition). Effective April 1, 2008, Hylsa exists solely as a service company which employs workers at the former Hylsa facilities and provides its services to Ternium on a contract basis. *See* Ternium's Initial Submission at page 2.

[3] Hylsamex is the former parent company of Hylsa. On August 22, 2005, Ternium Luxemburg (the corporate parent of Ternium (*see* Ternium's SQR at page 7)), acquired Hylsamex. *See* Ternium's Initial Submission at page 2.

SSSQR at appendices S–2 and S–1, respectively. In reviewing the March 2009 and June 2007 management charts, we found that Ternium Luxemburg's acquisition of IMSA resulted in minimal changes to the composition of Hylsa's/Ternium's directors/senior management personnel. Specifically, with regard to the March 2009 chart, of Ternium's 51 directors/senior management personnel, 7 are former IMSA employees, 31 are former Hylsa employees, and the remaining 13 transferred from other Ternium Luxemburg affiliates. Thus, we preliminarily find that former Hylsa employees occupy the majority of director/senior management positions at Ternium.

Ternium presented the following documentation in support of its assertion that it is the successor–in-interest to Hylsa: (1) a copy of documentation of the acquisition of Hylsamex by Ternium Luxemburg (*see* Ternium's SQR at appendix S–3), (2) diagrams depicting Ternium Luxemburg's corporate structure throughout the different stages of its acquisition of Hylsa, *see* Ternium's Initial Submission at attachment 3–A for corporate structure as of September 30, 2006 (*i.e.*, Ternium Luxemburg's corporate structure prior to the transfer) (*see also* Ternium's Initial Submission at attachment 3–D for corporate structure as of April 30, 2008 (*i.e.*, Ternium Luxemburg's corporate structure after the transfer)), (3) tables depicting the management structure of Hylsa as of June, 2007, *i.e.*, prior to the transfer (*see* Ternium's SSSQR at appendix S–1) and the current management structure of Ternium Luxemburg as of March 2009, *i.e.*, after the transfer of Hylsa (*see* Ternium's SSSQR at appendix S–2), (4) listings of Hylsa's suppliers of major inputs for production of subject merchandise in 2007 (*i.e.*, before the final transfer took place) and of Ternium's suppliers of inputs for production of subject merchandise in the second quarter of 2008, *i.e.*, after the transfer took effect (*see* Ternium's Initial Submission at attachment 6), (5) a list of Hylsa and Ternium facilities which have the capacity to produce subject merchandise (*see* Ternium's Initial Submission at attachment 4), (6) data on annual capacity and actual production of LWRPT for 2006, 2007, and 2008 (*see* Ternium's SSQR at appendix S–1) at said facilities, and (7) listings of (a) Hylsa's LWRPT customers in the home market and United States during 2007 (prior to the final transfer) (*see* Ternium's Initial Submission at attachment 5–A), (b) IMSA's LWRPT home market customers during 2007 (see Ternium's Initial Response at attachment 5–B), and (c) of Ternium's LWRPT home market and U.S. customers during the second quarter of 2008 (after the transfer took effect) (*see* Ternium's Initial Submission at attachment 5–C).

We examined the diagrams depicting Ternium Luxemburg's corporate structure throughout the different stages of its acquisition of Hylsa. *See* Ternium's Initial Submission at attachment 3 for diagrams of Ternium Luxemburg's corporate structure as of (1) September 2006 (attachment 3–A), (2) September 30, 2007 (attachment 3–B), (3) December 31, 2007 (attachment 3–C), and (4) April 30, 2008 (attachment 3–D).

We reviewed tables depicting the management structure of Hylsa as of June, 2007, *i.e.*, prior to the transfer of production and sales operations from Hylsa to Ternium (*see* Ternium's SSSQR at appendix S–1), and the current management structure of Ternium as of March 2009, *i.e.*, after the transfer of Hylsa's production and sales operations (*see* Ternium's SSSQR at appendix S–2). As noted in Ternium's Initial Submission on page 3 at footnote 2, the only significant changes involve: (1) transfers of personnel from other Ternium Luxemburg affiliates, (2) the promotion of former Hylsa employees to higher positions, and (3) changes to the structure of the organization chart (*i.e.*, the creation of new positions). Based on our examination of the diagrams and tables described above, we preliminarily find that Ternium's management structure, for the most part, resembles Hylsa's prior to its acquisition by Ternium Luxemburg. *See* Ternium's SSSQR at appendices S–1 and S–2.

We also reviewed the list of major input suppliers that Ternium provided at attachment 6 of its Initial Submission. We compared Hylsa's 2007 (*i.e.*, prior to the transfer) suppliers for each input to Ternium's second quarter 2008 (*i.e.*, after the transfer) suppliers for each input. We noted no changes in suppliers between Hylsa and Ternium's lists, except changes relating to input suppliers that supply the former IMSA facility of Apodaca.

We examined the customer lists that Ternium provided in its Initial Submission at attachment 5. Specifically, we compared Hylsa's 2007 (*i.e.*, prior to the transfer) list of home and export customers (including U.S. customers) for LWRPT (*see* attachment 5–A) to Ternium's second quarter 2008 (*i.e.*, after the transfer) list of home and export market customers (including U.S. customers) (*see* attachment 5–C) and also examined IMSA's 2007 home market customer list (*see* attachment 5–B). Ternium affirmed in their SQR at page 11 and in their SSSQR at page 8, that none of the former Hylsa customers discontinued their relationship with Ternium due to the acquisition of Hylsamex by Ternium Luxemburg. The Department requested clarification as to why certain customer's appeared on Hylsa's 2007 and IMSA's 2007 customer lists but did not appear on Ternium's second quarter 2008 customer list and *vice versa*. Ternium explained in its SSSQR at pages 6 and 7 that the customer lists in its Initial Submission at attachment 5 identified: (1) the home market and U.S. customers that actually purchased subject merchandise from Hylsa during 2007 and the home market customers that actually purchased subject merchandise from IMSA during 2007, and (2) the home market and U.S. customers that actually purchased subject merchandise from Ternium during the second quarter of 2008. In other words, the lists did not purport to reflect all of the customers that maintained relationships with Hylsa, IMSA, and Ternium during each period which is why several of the names on each list did not match. Ternium also explained that all former Hylsa customers were maintained as customers in Ternium's sales computer following the merger and were eligible to make purchases at any time. *See* Ternium's SSSQR at page 7. While we note that some of the customers from IMSA's 2007 customer list are present in Ternium's second quarter 2008 customer list (and were not present in Hylsa's 2007 list), given the overall Ternium second quarter 2008 customer list, we preliminarily find that Ternium's customer list is representative of Hylsa's prior to its acquisition by Ternium Luxemburg. Therefore, based on record information, we preliminarily find that Ternium's customer base resembles Hylsa's prior to its acquisition by Ternium Luxemburg.

We also examined Ternium's list of production facilities that are capable of producing LWRPT (including merchandise that falls within the scope of the antidumping duty order on LWRPT) provided at attachment 4 of its Initial Submission. Ternium stated in its SSQR at page 3 that none of the LWRPT produced at the facility formerly operated by IMSA is certified to meet any ASTM A–500 or A–513 standards for LWRPT or any other industry specifications for LWRPT, and as a result, are not exported to the United States. Because the former IMSA facility is limited in its abilities to produce

subject merchandise that is appealing to customers in the United States, *i.e.*, not certified to meet ASTM, and its capacity to produce subject merchandise is relatively small when compared to both former Hylsa facilities, we preliminarily determine that although production facilities for LWRPT have changed between pre–transfer Hylsa and post–transfer Ternium (which includes both the former Hylsa facilities and the facility formerly operated by IMSA), the post–transfer Ternium's production facilities are not so significantly different from the former Hylsa production facilities that Ternium would be precluded from being a successor to Hylsa.

The documentation and analysis thereof described above, both with regard to the transfer of production and sales operations from Hylsa to Ternium as well as Ternium Luxemburg's acquisition of Grupo IMSA (and its subsidiary IMSA), demonstrates that there was little to no change in management structure, supplier relationships, production facilities, or customer base between pre–acquisition Hylsa and post–acquisition (after the acquisitions of Hylsamex and Grupo IMSA) Ternium. For these reasons, we preliminarily find that Ternium is the successor–in-interest to Hylsa and, thus, should be accorded the same antidumping duty treatment with respect to LWRPT from Mexico as Hylsa. If the above preliminary results are affirmed in the Department's final results, the cash deposit rate from this changed circumstances review will apply to all entries of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this changed circumstances review. *See Granular Polytetrafluoroethylene Resin from Italy; Final Results of Antidumping Duty Changed Circumstances Review*, 68 FR 25327 (May 12, 2003).

Public Comment

In accordance with 19 CFR 351.310(c), any interested party may request a hearing within 30 days of publication of this notice. Any hearing, if requested, will be held no later than 37 days after the date of publication of this notice, or the first workday thereafter. Case briefs from interested parties may be submitted not later than 30 days after the date of publication of this notice, in accordance with 19 CFR 351.309(c)(ii). Rebuttal briefs, limited to the issues raised in those comments, may be filed not later than 5 days after the time limit for filing the case brief, in accordance with 19 CFR 351.309(d). All written comments shall be submitted in accordance with 19 CFR 351.303. Persons interested in attending the hearing, if one is requested, should contact the Department for the date and time of the hearing. In accordance with 19 CFR 351.216(e), the Department will issue the final results of its antidumping duty changed circumstances review not later than 270 days after the date on which the review is initiated.

During the course of this antidumping duty changed circumstances review, deposit requirements for the subject merchandise exported and manufactured by Ternium will continue to be the all–others rate established in the investigation. *See Light–Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea (Korea): Antidumping Duty Orders; Light–Walled Rectangular Pipe and Tube from Korea: Notice of Amended Final Determination of Sales at Less Than Fair Value*, 73 FR 45403 (August 5, 2008). The cash deposit rate will be altered, if warranted, pursuant only to the final results of this review.

We are issuing and publishing these preliminary results and notice in accordance with sections 751(b)(1) and 777(i)(1) and (2) of the Act and 19 CFR 351.216.

Dated: June 11, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–14369 Filed 6–17–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1615]

Expansion and Reorganization of Foreign-Trade Zone 147, Reading, Pennsylvania Area

Pursuant to its authority under the Foreign-Trade Zones (FTZ) Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zone Corporation of Southern Pennsylvania, grantee of Foreign-Trade Zone No. 147, submitted an application to the Board for authority to expand and reorganize FTZ 147 by deleting Site 4—Parcels A and C (632 acres total) and adding four additional sites (Sites 16–19) in Franklin and Cumberland Counties, Pennsylvania, adjacent to the Harrisburg Customs and Border Protection port of entry (FTZ Docket 35–2008, filed 5/27/2008);

Whereas, notice inviting public comment was given in the **Federal Register** (73 FR 31812, 6/4/2008) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to expand and reorganize FTZ 147 is approved, subject to the Act and the Board's regulations, including Section 400.28, subject to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project, and further subject to a sunset provision that would terminate authority on May 31, 2014, for Sites 16–19 where no activity has occurred under FTZ procedures before that date.

Signed at Washington, DC, this 29th day of May 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E9–14245 Filed 6–17–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XO99

Incidental Takes of Marine Mammals During Specified Activities; Low-Energy Marine Seismic Survey in the Northwest Atlantic Ocean, August 2009

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; proposed incidental take authorization; request for comments.

SUMMARY: NMFS has received an application from Rice University (Rice), for an Incidental Harassment Authorization (IHA) to take small numbers of marine mammals, by harassment, incidental to conducting a marine seismic survey in the Northwest Atlantic during August 2009. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS requests comments on its proposal to authorize Rice to

incidentally take, by Level B harassment only, small numbers of marine mammals during the aforementioned activity.

DATES: Comments and information must be received no later than July 20, 2009.

ADDRESSES: Comments on the application should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing e-mail comments is *PR1.0648-XO99@noaa.gov.* Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size.

A copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.*

Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Howard Goldstein or Ken Hollingshead, Office of Protected Resources, NMFS, 301–713–2289.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of marine mammals by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental taking shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as '' * * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [''Level A harassment'']; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [''Level B harassment''].

16 U.S.C. 1362(18).

Section 101(a)(5)(D) establishes a 45-day time limit for NMFS' review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

Summary of Request

On April 21, 2009, NMFS received an application from Rice for the taking, by Level B harassment only, of small numbers of marine mammals incidental to conducting, under a cooperative agreement with the National Science Foundation (NSF), a low-energy marine seismic survey in the Northwest Atlantic Ocean. The funding for the survey is provided by the NSF. The proposed survey will occur off New England within the U.S Exclusive Economic Zone (EEZ). Seismic operations will occur over the continental shelf southeast of the island of Martha's Vineyard, Massachusetts, and likely also in Nantucket Sound (see Figure 1 of Rice's application). The cruise is currently scheduled to occur from August 12 to 25, 2009. The survey will use two Generator Injector (GI) airguns with a discharge volume of 90 in^3. Some minor deviation from these dates is possible, depending on logistics and weather.

Description of the Specified Activity

Rice plans to conduct a low-energy marine seismic survey and bathymetric program. The planned survey will involve one source vessel, the R/V *Endeavor* (*Endeavor*), which will occur in the Northwest Atlantic Ocean off of New England.

The proposed survey will examine stratigraphic controls on freshwater beneath the continental shelf off the U.S. east coast. In coastal settings worldwide, large freshwater volumes are sequestered in permeable continental shelf sediments. Freshwater storage and discharge have been documented off North and South America, Europe, and Asia. The proposed survey will investigate the Atlantic continental shelf off New England, where freshwater extends up to 100 km offshore. Using high-resolution mathematical models and existing data, it is estimated that approximately 1,300 km^3 (312 mi^3) of freshwater is sequestered in the continental shelf from New York to Maine. However, the models indicate that the amount of sequestered freshwater is highly dependent on the thickness and distribution of aquifers and aquicludes. The proposed survey will provide imaging of the subsurface and characterize the distribution of aquifers and aquicludes off Martha's Vineyard.

The study will provide data integral to improved models to estimate the abundance of sequestered freshwater and will provide site survey data for an Integrated Ocean Drilling Program (IODP) proposal to drill these freshwater resources for hydrogeochemical, biological, and climate studies. Combined seismic and drilling data could help identify undeveloped freshwater resources that may represent a resource to urban coastal centers, if accurately characterized and managed. On a global scale, vast quantities of freshwater have been sequestered in the continental shelf and may represent an increasingly valuable resource to humans. This survey will help constrain process-based mathematical models for more precise estimations of the abundance and distribution of freshwater wells on the continental shelf.

The source vessel, the *Endeavor,* will deploy two low-energy GI airguns as an energy source (with a discharge volume of 90 in^3) and a 600 m (1,969 ft) towed hydrophone streamer. The energy to the GI airgun is compressed air supplied by compressors onboard the source vessel. As the GI airgun is towed along the survey lines, the receiving systems will receive the returning acoustic signals.

The planned seismic program will consist of approximately 1,757 km (1,092 mi) of surveys lines and turns (see Figure 1 of Rice's application). Most of the survey effort (approximately 1,638 km or 1,018 mi) will take place in water <100 m deep, and approximately 119 km (74 mi) will occur just past the

shelf edge, in water depths >100 m (328 ft). There may be additional seismic operations associated with equipment testing, start-up, and repeat coverage of any areas where initial data quality is sub-standard.

All planned geophysical data acquisition activities will be conducted with assistance by scientists who have proposed the study, Dr. B. Dugan of Rice University, Dr. D. Lizarralde of Woods Hole Oceanographic Institution, and Dr. M. Person of New Mexico Institute of Mining and Technology. The vessel will be self-contained, and the crew will live aboard the vessel for the entire cruise.

In addition to the seismic operations of the two GI airguns, a Knudsen 3260 echosounder, and EdgeTech sub-bottom profiler, and a ''boomer'' system to image sub-bottom seafloor layers will be used at times during the survey.

Vessel Specifications

The *Endeavor* has a length of 56.4 m (185 ft), a beam of 10.1 m (33.1 ft), and a maximum draft of 5.6 m (18.4 ft). The *Endeavor* has been operated by the University of Rhode Island's Graduate School of Oceanography for over thirty years to conduct oceanographic research throughout U.S. and world marine waters. The ship is powered by a single GM/EMD diesel engine, producing 3,050 hp, which drives a single propeller directly at a maximum of 900 revolutions per minute (rpm). The vessel also has a 320 hp bowthruster, which is not used during seismic acquisition. The optimal operation speed during seismic acquisition will be approximately 7.4 km/hour. When not towing seismic survey gear, the *Endeavor* can cruise at 18.5 km/hour. The *Endeavor* has a range of 14,816 km (9,206 mi). The *Endeavor* will also serve as the platform from which vessel-based Marine Mammal Visual Observers (MMVO) will watch for animals before and during GI airgun operations.

Acoustic Source Specifications

Seismic Airguns

During the proposed survey, the *Endeavor* will tow two GI airguns, with a volume of 90 in^3, and a 600 m long streamer containing hydrophones along predetermined lines. The two GI airguns will be towed approximately 25 m (82 ft) behind the *Endeavor* at a depth of approximately 3 m (10 ft). Seismic pulses will be emitted at intervals of approximately 5 seconds. At a speed of 7.4 km/hour, the 5 second spacing corresponds to a shot interval of approximately 10 m (33 ft). The operating pressure will be 2,000 psi. A single GI airgun will be used during turns.

The generator chamber of each GI airgun, the one responsible for introducing the sound pulse into the ocean, has a volume of 45 in^3. The larger (105 in^3) injector chamber injects air into the previously-generated bubble to maintain its shape, and does not introduce more sound into the water. Both GI airguns will be fired simultaneously, for a total discharge volume of 90 in^3. The GI airguns are relatively small compared to most other airgun arrays used for seismic arrays.

A single GI airgun, a single 15 in^3 watergun, or a boomer system may be used in shallow waters with sandy seafloors if the two GI airguns do not provide accurate seafloor imaging. The watergun is a marine seismic sound source that uses an implosive mechanism to provide an acoustic signal. Waterguns provide a richer source spectra in high frequencies (≤200 Hz) than those of GI or airguns. The 15 in^3 watergun potentially provides a cleaner signal for high-resolution studies in shallow water, with a short-pulse (<30 ms) providing resolution of approximately 10 m. The operating pressure will be 2,000 psi. Peak pressure of the single watergun and the boomer system is estimated to be approximately 212 dB (0.4 bar-m). Thus, both sources would have a considerably lower source level than the two GI airguns and single GI airgun.

The root mean square (rms) received levels that are used as impact criteria for marine mammals are not directly comparable to the peak (pk or 0-pk) or peak-to-peak (pk–pk) values normally used to characterize source levels of airgun arrays. The measurement units used to describe airgun sources, peak or peak-to-peak decibels, are always higher than the ''root mean square'' (rms) decibels referred to in biological literature. A measured received level of 160 dB re 1 μPa (rms) in the far field would typically correspond to a peak measurement of approximately 170 to 172 dB, and to a peak-to-peak measurement of approximately 176 to 178 dB, as measured for the same pulse received at the same location (Greene, 1997; McCauley *et al.,* 1998, 2000). The precise difference between rms and peak or peak-to-peak values depends on the frequency content and duration of the pulse, among other factors. However, the rms level is always lower than the peak or peak-to-peak level for an airgun-type source.

The sound pressure field of two 45 in^3 GI airguns has not been modeled, but those for two 45 in^3 Nucleus G airguns and one 45 in^3 GI airgun have been modeled by Lamont-Doherty Earth Observatory (L–DEO) of Columbia University in relation to distance and direction from the airguns (see Figure 2 and 3 of Rice's application). The GI airgun is essentially two G airguns that are joined head to head. The G airgun signal has more energy than the GI airgun signal, but the peak energy levels are equivalent and appropriate for modeling purposes. The L–DEO model does not allow for bottom interactions, and is most directly applicable to deep water. Based on the modeling, estimates of the maximum distances from GI airguns where sound levels of 190, 180, and 160 dB re 1 μPa (rms) are predicted to be received in deep (>1,000 m) water are shown in Table 1 of Rice's application. Because the model results are for G airguns, which have more energy than GI airguns of the same size, those distances are overestimates of the distances for the 45 in^3 GI airguns.

Echosounder

The Knudsen 3260 is a deep-water, dual-frequency echosounder with operating frequencies of 3.5 and 12 kHz. The high frequency (12 kHz) can be used to record water depth or to track pingers attached to various instruments deployed over the side. The low frequency (3.5 kHz) is used for sub-bottom profiling. Both frequencies will be used simultaneously during the present study. It will be used with a hull-mounted, downward-facing transducer. A pulse up to 24 ms in length is emitted every several seconds with a nominal beam width of 80°. Maximum output power at 3.5 kHz is 10 kW and at 12 kHz it is 2 kW. The maximum source output (downward) for the 3260 is estimated to be 211 dB re 1 μPam at 10 kW.

Sub-bottom Profiler (SBP)

The SBP is normally operated to provide information about sedimentary features and bottom topography; it will provide a 10 cm resolution of the sub-floor. During operations in deeper waters (>30–40 m), an EdgeTech 3200–XS SBP will be operated from the ship with a SB–512i towfish that will be towed at a depth of 5 m. It will transmit and record a 0.5–12 kHz swept pulse (or chirp), with a nominal beam width of 16–32°. The SBP will produce a 30 ms pulse repeated at 0.5 to 1 s intervals. Depending on seafloor conditions, it could penetrate up to 100 m.

Boomer

The 'boomer' system will be an alternative source of sub-floor imaging in shallower waters (<30 to 40 m or 98 to 131 ft). The Applied Acoustics

AA200 'boomer' system, run by the National Oceanography Centre, operates at frequencies of approximately 0.3 to 3 kHz. The system will be surface-towed, and a 60 m (197 ft) hydrophone streamer will receive its pulses. The streamer will be towed at 1 m depth and approximately 25 to 30 m (82 to 98 ft) behind the *Endeavor.* A 0.1 ms pulse will be transmitted at 1 s intervals. The normal source output (downward) is 212 dB re 1 µPam.

Safety Radii

NMFS has determined that for acoustic effects, using acoustic thresholds in combination with corresponding safety radii is the most effective way to consistently apply measures to avoid or minimize the impacts of an action, and to quantitatively estimate the effects of an action. Thresholds are used in two ways: (1) To establish a mitigation shut-down or power-down zone, *i.e.,* if an animal enters an area calculated to be ensonified above the level of an established threshold, a sound source is powered down or shut down; and (2) to calculate take, in that a model may be used to calculate the area around the sound source that will be ensonified to that level or above, then, based on the estimated density of animals and the distance that the sound source moves, NMFS can estimate the number of marine mammals that may be ''taken.''

As a matter of past practice and based on the best available information at the time regarding the effects of marine sound compiled over the past decade, NMFS has used conservative numerical estimates to approximate where Level A harassment from acoustic sources begins: 180 re 1 µPa (rms) level for cetaceans and 190 dB re 1 µPa (rms) for pinnipeds. A review of the available scientific data using an application of science-based extrapolation procedures (Southall *et al.,* 2007) strongly suggests that Level A harassment (as well as TTS) from single exposure impulse events may occur at much higher levels than the levels previously estimated using very limited data. However, for purposes of this proposed action, Rice's application sets forth, and NMFS is using, the more conservative 180 and 190 dB re 1 µPa (rms) criteria. NMFS considers 160 re 1 µPa (rms) as the criterion for estimating the onset of Level B harassment from acoustic sources like impulse sounds used in the seismic survey.

Emperical data concerning the 180 and 160 dB distances have been acquired based on measurements during the acoustic verification study conducted by L–DEO in the northern Gulf of Mexico from May 27 to June 3, 2003 (Tolstoy *et al.,* 2004a,b). Although the results are limited the data showed that radii around the airguns where the received level would be 180 dB re 1 µPa (rms), the safety criterion applicable to cetaceans (NMFS, 2000), vary with water depth. Similar depth-related variation is likely in the 190 dB distances applicable to pinnipeds. Correction factors were developed for water depths 100–1,000 m and <100 m; the proposed survey will occur in depths approximately 20 to 125 m.

The empirical data indicate that, for deep water (>1,000 m), the L–DEO model tends to overestimate the received sound levels at a given distance (Tolstoy *et al.,* 2004a,b). However, to be precautionary pending acquisition of additional empirical data, it is proposed that safety radii during GI airgun operations in deep water will be values predicted by L–DEO's model (see Table 1 below). Therefore, the assumed 180 and 190 dB radii are 40 m (131 ft) and 10 m (33 ft) respectively.

Empirical measurements were not conducted for intermediate depths (100–1,000 m). On the expectation that results will be intermediate between those from shallow and deep water, a 1.5× correction factor is applied to the estimates provided by the model for deep water situations. This is the same factor that was applied to the model estimates during L–DEO cruises in 2003. The assumed 180 and 190 dB radii in intermediate depth water are 60 m (197 ft) and 15 m (49 ft), respectively (see Table 1 below).

Empirical measurements indicated that in shallow water (<100 m), the L–DEO model underestimates actual levels. In previous L–DEO projects, the exclusion zones were typically based on measured values and ranged from 1.3 to 15× higher than the modeled values depending on the size of the airgun array and the sound level measured (Tolstoy *et al.,* 2004a,b). During the proposed cruise, similar factors will be applied to derive appropriate shallow water radii from the modeled deep water radii (see Table 1 below). The assumed 180 and 190 dB radii in shallow depth water are 296 m (971 ft) and 147 m (482 ft), respectively (see Table 1 below).

TABLE 1

[Predicted distances to which sound levels ≥190, 180, and 160 dB re 1 µPa might be received in shallow (<100 m; 328 ft), intermediate (100–1,000 m; 328–3,280 ft), and deep (>1,000 m; 3,280 ft) water from the two 45 in^3 GI airguns used during the seismic surveys in the northwest Atlantic Ocean during August 2009, and one 45 in^3 GI airgun that will be used during turns. Distances are based on model results provided by L–DEO.]

Source and volume	Tow depth (m)	Water depth	Predicted RMS distances (m)		
			190 dB	180 dB	160 dB
One GI airgun 45 in^3	3	Deep (>1,000 m)	8	23	220
		Intermediate (100–1,000 m)	12	35	330
		Shallow (<100 m)	95	150	570
Two GI airguns 45 in^3	3	Deep (>1,000 m)	10	40	350
		Intermediate (100–1,000 m)	15	60	525
		Shallow (<100 m)	147	296	1,029

The GI airguns, watergun, or boomer will be shut-down immediately when cetaceans are detected within or about to enter the 180 dB re 1 µPa (rms) radius for the two GI airguns, or when pinnipeds are detected within or about to enter the 190 dB re 1 µPa (rms) radius for the two GI airguns. The 180 and 190 dB shut down criteria are consistent

with guidelines listed for cetaceans and pinnipeds, respectively, by NMFS (2000) and other guidance by NMFS.

Proposed Dates, Duration, and Region of Activity

The *Endeavor* is expected to depart from Narragansett, Rhode Island, on approximately August 12, 2009, for an approximately four hour transit to the study area southeast of Martha's Vineyard (see Figure 1 of Rice's application). Seismic operations will commence upon arrival at the study area, with highest priority given to the central NNW–SSE line, followed by WSW–ENE lines, each of which cross the proposed IODP sites; lowest priority will be given to the survey lines in Nantucket Sound. The 14 day program will consist of approximately 11 days of seismic operations, and three contingency days in case of inclement weather. The *Endeavor* will return to Narragansett on approximately August 25, 2009. The exact dates of the proposed activities depend on logistics, weather conditions, and the need to repeat some lines if data quality is substandard.

The proposed seismic survey will encompass the area 39.8° to 41.5° N, 69.8° to 70.6° W (see Figure 1 of Rice's application). Water depths in the study area range from approximately 20 to 125 m (66 to 410 ft), but are typically <100 m. The proposed survey will take place in Nantucket Sound and south of Nantucket and Martha's Vineyard. The ship will approach the south shore of Martha's Vineyard within 10 km (6.2 mi). The seismic survey will be conducted within the Exclusive Economic Zone (EEZ) of the U.S.A.

Description of Marine Mammals in the Proposed Activity Area

A total of 34 marine mammal species (30 cetacean and 4 pinniped) are known to or may occur in the proposed study area (see Table 2, Waring *et al.,* 2007). Several species are listed as Endangered under the Endangered Species Act (ESA): the North Atlantic right, humpback, sei, fin, blue, and sperm whales. The Western North Atlantic Coastal Morphotype Stock of common bottlenose dolphins is listed as Depleted under the MMPA.

Table 2 below outlines the marine mammal species, their habitat, abundance, density, and conservation status in the proposed project area. Additional information regarding the distribution of these species expected to be found in the project area and how the estimated densities were calculated may be found in Rice's application.

TABLE 2

[The occurrence, habitat, regional abundance, conservation status, best and maximum density estimates, number of marine mammals that could be exposed to sound level at or above 160dB re 1μPa, best estimate of number of individuals exposed, and best estimate of number of exposures per marine mammal in or near the proposed low-energy seismic survey area in the Northwest Atlantic Ocean. See Tables 2–4 in Rice's application for further detail.]

Species	Habitat	Occurrence in study area	Regional best abundance est. (CV) [1]	ESA[a]	Density/ 1000km[2] (best)	Density/ 1000km[2] (max)
Mysticetes						
North Atlantic right whale (*Eubalaena glacialis*).	Coastal and shelf waters.	Common	325 (0) [2]	NL	N.A.	N.A.
Humpback whale (*Megaptera novaeangliae*).	Mainly nearshore waters and banks.	Common	11,570 [3]	EN	0.56	19.68
Minke whale (*Balaenoptera acutorostrata*).	Pelagic and coastal	Common	188,000 [4]	NL	0.05	7.35
Bryde's whale (*Balaenoptera brydei*)	Primarily offshore, pelagic.	Rare	N.A.	NL	N.A.	N.A.
Sei whale (*Balaenoptera borealis*)	Primarily offshore, pelagic.	Uncommon	10,300 [5]	EN	N.A.	N.A.
Fin whale (*Balaenoptera physalus*)	Continental slope, mostly pelagic.	Common	35,500 [6]	EN	3.86	26.09
Blue whale (*Balaenoptera musculus*)	Pelagic, shelf and coastal.	Uncommon?	1,186 [7]	EN	N.A.	N.A.
Odontocetes						
Sperm whale (*Physeter macrocephalus*)	Usually pelagic and deep seas.	Common?	13,190 [8]	EN	0.38	26.88
Pygmy sperm whale (*Kogia breviceps*)	Deep waters off shelf.	Uncommon	N.A.	NL	N.A.	N.A.
Dwarf sperm whale (*Kogia sima*)	Deep waters off the shelf.	Uncommon	N.A.	NL	N.A.	N.A.
Cuvier's beaked whale (*Ziphius cavirostris*).	Pelagic	Uncommon	N.A.	NL	N.A.	N.A.
Northern bottlenose whale (*Hyperodon ampullatus*).	Pelagic	Rare	40,000 [9]	NL	N.A.	N.A.
True's beaked whale (*Mesoplodon mirus*).	Pelagic	Rare	N.A.	NL	N.A.	N.A.
Gervais' beaked whale (*Mesoplodon europaeus*).	Pelagic	Rare	N.A.	NL	N.A.	N.A.
Sowerby's beaked whale (*Mesoplodon bidens*).	Pelagic	Rare	N.A.	NL	N.A.	N.A.
Blainville's beaked whale (*Mesoplodon densirostris*).	Pelagic	Rare	N.A.	NL	N.A.	N.A.
Unidentified beaked whale	Pelagic	Rare	N.A.	NL	0.01	0.82
Bottlenose dolphin (*Tursiops truncatus*)	Coastal, shelf and offshore.	Common	81,588 (0.17) [10]	NL	14.02	163.02

TABLE 2—Continued

[The occurrence, habitat, regional abundance, conservation status, best and maximum density estimates, number of marine mammals that could be exposed to sound level at or above 160dB re 1μPa, best estimate of number of individuals exposed, and best estimate of number of exposures per marine mammal in or near the proposed low-energy seismic survey area in the Northwest Atlantic Ocean. See Tables 2–4 in Rice's application for further detail.]

Species	Habitat	Occurrence in study area	Regional best abundance est. (CV) [1]	ESA[a]	Density/ 1000km[2] (best)	Density/ 1000km[2] (max)
Pantropical spotted dolphin (*Stenella attenuata*).	Coastal and pelagic	Rare	N.A.	NL	N.A.	N.A.
Atlantic spotted dolphin (*Stenella frontalis*).	Mainly coastal waters.	Uncommon?	50,978 (0.42)	NL	N.A.	N.A.
Spinner dolphins (*Stenella longirostris*)	Coastal and pelagic	Rare	N.A.	NL	N.A.	N.A.
Striped dolphin (*Stenella coeruleoalba*)	Off continental shelf.	Common?	94,462 (0.40)	NL	0.11	73.61
Short-beaked common dolphin (*Delphinus delphis*).	Continental shelf and pelagic.	Common	120,743 (0.23)	NL	128.88	1,108.71
White-beaked dolphin (*Lagenorhynchus albirostris*).	Continental shelf (<200 m).	Uncommon?	10s to 100s of 1,000s [11].	NL	N.A.	N.A.
Atlantic white-sided dolphin (*Lagenorhynchus acutus*).	Shelf and slope waters.	Common	10s to 100s of 1,000s [12].	NL	N.A.	N.A.
Risso's dolphin (*Grampus griseus*)	Shelf, slope, seamounts (waters 400–1,000 m).	Common	20,479 (0.59)	NL	0.48	322.67
False killer whale (*Pseudorca crassidens*).	Tropical, temperate, pelagic.	Extralimital	N.A.	NL	N.A.	N.A.
Killer whale (*Orcinus orca*)	Coastal, widely distributed.	Rare	N.A.	*NL	N.A.	N.A.
Long-finned pilot whale (*Globlicephala melas*).	Mostly pelagic	Common?	810,000 [13]	NL	N.A.	N.A.
Short-finned pilot whale (*Globicephala macrorhynchus*).	Mostly pelagic, high-relief topography.	Common?	810,000 [13]	NL	N.A.	N.A.
Unidentified pilot whale (*Globicephala* sp.).	Mostly pelagic	Common?	810,000 [13]	NL	6.44	382.52
Harbor porpoise (*Phocoena phocoena*)	Coastal and inland waters.	Common?	500,000 [14]	NL	N.A.	N.A.
Pinnipeds						
Harbor seal (*Phoca vitulina*)	Coastal	Common	99,340	NL	N.A.	N.A.
Gray seal (*Halichoerus grypus*)	Coastal	Common	52,500 [15]	NL	N.A.	N.A.
Harp seal (*Pagophilius groenlandicus*)	Coastal	Uncommon	5,500,000 [16]	NL	N.A.	N.A.
Hooded seal (*Cystophora cristata*)	Coastal	Uncommon	592,100 [17]	NL	N.A.	N.A.

N.A.—Data not available or species status was not assessed, ? indicated uncertainty

[a] U.S. Endangered Species Act: EN = Endangered, T = Threatened, NL = Not listed

[1] Abundance estimates are given from Waring *et al.* (2007), typically for U.S. Western North Atlantic stocks unless otherwise indicated; For species whose distribution is primarily offshore or not known, the estimates for the U.S. EEZ in Waring *et al.* (2007) are not considered for the study area and the regional population is given as N.A. unless it is available from another source.

[2] Estimate updated in NMFS 2008 draft stock assessment report.

[3] Estimate for the western North Atlantic (IWS, 2007a).

[4] Estimate for the North Atlantic (IWC, 2007; Waring *et al.,* 2007).

[5] Estimate for the Northeast Atlantic (Cattanach *et al.,* 1993).

[6] Estimate for the North Atlantic (IWC, 2007a; Waring *et al.,* 2007).

[7] Estimate for the North Atlantic (NMFS, 1998).

[8] Estimate for Northeast Atlantic (Whitehead, 2002).

[9] Estimate for Northeast Atlantic (NAAMCO, 1995: 77).

[10] Estimate for the Western North Atlantic and Offshore stock, and may include coastal forms. 43,951 animals estimated for all management units of the Coastal morphotype (Waring *et al.,* 2007).

[11] Tens to low hundreds of thousands (Reeves *et al.,* 1999a).

[12] High tens to low hundreds of thousands (Reeves *et al.,* 1999b).

[13] Estimate may include both long- and short-finned pilot whales.

[14] Estimate for the North Atlantic (Jefferson *et al.,* 2008)

[15] Estimate for the northwest Atlantic Ocean in the Gulf of St. Lawrence and along the Nova Scotia eastern shore (Hammill, 2005).

[16] Estimate for the northwest Atlantic Ocean (DFO, 2007).

[17] Estimate for the northwest Atlantic Ocean (ICES, 2006).

*Southern Resident killer whales in the eastern Pacific Ocean, near Washington state, are listed as endangered under the ESA, but not in the Atlantic Ocean.

^The Western North Atlantic Coastal Morphotype stock, ranging from NJ to FL, is listed as depleted under the MMPA.

Several Federal Marine Protected Areas (MPAs) or sanctuaries have been established near the proposed study area, primarily with the intention of preserving cetacean habitat (see Table 3 of Rice's application; Hoyt, 2005; Cetacean Habitat, 2009; see also Figure 1 of Rice's application). Cape Cod Bay is designated as Right Whale Critical Habitat, as is the Great South Channel Northern Right Whale Critical Habitat Area located to the east of Cape Cod.

The Gerry E. Studds Stellwagen Bank National Marine Sanctuary is located north of the proposed study area in the Gulf of Maine. The proposed survey is not located within any Federal MPAs or sanctuaries. However, a sanctuary designated by the state of Massachusetts occurs within the study area—the Cape & Islands Ocean Sanctuary. This sanctuary includes nearshore waters of southern Cape Cod, Martha's Vineyard, and Nantucket (see Table 3 of Rice's application). In addition, there are four National Wildlife Refuges within the study area (Monomoy, Nantucket, Mashpee, and Nomans Island) and a National Estuarine Research Reserve (Waquoit Bay). Except for Nomans Island, these refuges and reserves are located in Nantucket Sound. Three Canadian protected areas also occur in the Northwest Atlantic for cetacean habitat protection, including the Bay of Fundy and Roseway Basin Right Whale Conservation Areas (see Figure 1 of Rice's application), as well as the Gully Marine Protected Area off the Scotian Shelf.

There are several areas that are closed to commercial fishing on a seasonal basis to reduce the risk of entanglement or incidental mortality to marine mammals. To protect large whales like right, humpback, and fin whales, NMFS implemented seasonal area management zones for lobster, several groundfish, and other marine invertebrate trap/pot fisheries, prohibiting gear in the Great South Channel Critical Habitat Area from April through June; additional dynamic area management zones could be imposed for 15 day time periods if credible fisheries observers identify concentrations of right whales in areas north of 40° N (NMFS 1999, 2008). To reduce fishery impacts on harbor porpoises, additional time and area closures in the Gulf of Maine include fall and winter along the mid-coastal area, winter and spring in Massachusetts Bay and southern Cape Cod, winter and spring in offshore areas, and February around Cashes Ledge (NMFS, 1998). Fishermen are also required to use pingers, and New Jersey and mid-Atlantic waters could close seasonally for fishermen failing to apply specific gear modifications (NMFS, 1998).

Potential Effects on Marine Mammals

Potential Effects of Airguns

The effects of sounds from airguns might result in one or more of the following: tolerance, masking of natural sounds, behavioral disturbances, temporary or permanent hearing impairment, and non-auditory physical or physiological effects (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007). Permanent hearing impairment, in the unlikely event that it occurred, would constitute injury, but temporary threshold shift (TTS) is not an injury (Southall *et al.,* 2007). Although the possibility cannot be entirely excluded, it is unlikely that the project would result in any cases of permanent hearing impairment, or any significant non-auditory physical or physiological effects. Some behavioral disturbance is expected, but this would be localized and short-term.

Tolerance

Numerous studies have shown that pulsed sounds from airguns are often readily detectable in the water at distances of many kilometers. For a brief summary of the characteristics of airgun pulses, see Appendix A of Rice's application. However, it should be noted that most of the measurements of airgun sounds would be detectable considerably farther away than the GI airguns planned for use in the proposed project.

Several studies have shown that marine mammals at distances more than a few kilometers from operating seismic vessels often show no apparent response–see Appendix A of Rice's application. That is often true even in cases when the pulsed sounds must be readily audible to the animals based on measured received levels and the hearing sensitivity of the mammal group. Although various baleen whales, toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to airgun pulses under some conditions, at other times, mammals of all three types have shown no overt reactions. In general, pinnipeds usually seem to be more tolerant of exposure to airgun pulses than are cetaceans, with relative responsiveness of baleen and toothed whales being variable. Given the relatively small and low-energy GI airgun source planned for use in this project, mammals are expected to tolerate being closer to this source more so than would be the case for a larger airgun source typical of most seismic surveys.

Masking

Obscuring of sounds of interest by interfering sounds, generally at similar frequencies, is known as masking. Masking effects of pulsed sounds (even from large arrays of airguns) on marine mammal calls and other natural sounds are expected to be limited, although there are few specific data of relevance. Because of the intermittent nature and low duty cycle of seismic pulses, animals can emit and receive sounds in the relatively quiet intervals between pulses. However in some situations, multi-path arrivals and reverberation cause airgun sound to arrive for much or all of the interval between pulses (Simard *et al.,* 2005; Clark and Gagnon, 2006), which could mask calls.

Some baleen and toothed whales are known to continue calling in the presence of seismic pulses. The airgun sounds are pulsed, with quiet periods between the pulses, and whale calls often can be heard between the seismic pulses (Richardson *et al.,* 1986; McDonald *et al.,* 1995; Greene *et al.,* 1999; Nieukirk *et al.,* 2004; Smultea *et al.,* 2004; Holst *et al.,* 2005a,b, 2006). In the northeast Pacific Ocean, blue whale calls have been recorded during a seismic survey off Oregon (McDonald *et al.,* 1995). Among odontocetes, there has been one report that sperm whales cease calling when exposed to pulses from a very distant seismic ship (Bowles *et al.,* 1994). However, more recent studies found that sperm whales continued calling in the presence of seismic pulses (Madsen *et al.,* 2002; Tyack *et al.,* 2003; Smultea *et al.,* 2004; Holst *et al.,* 2006; Jochens *et al.,* 2006, 2008). Given the small source planned for use during the proposed survey, there is even less potential for masking of baleen or sperm whale calls during the present study than in most seismic surveys. Masking effects of seismic pulses are expected to be negligible in the case of the small odontocetes given the intermittent nature of seismic pulses. Dolphins and porpoises commonly are heard calling while airguns are operating (Gordon *et al.,* 2004; Smultea *et al.,* 2004; Holst *et al.,* 2005a,b; Potter *et al.,* 2007). Also, the sounds important to small odontocetes are predominantly at much higher frequencies than the airgun sounds, thus further limiting the potential for masking. In general, masking effects of seismic pulses are expected to be minor, given the normally intermittent nature of seismic pulses. Masking effects on marine mammals are discussed further in Appendix A of Rice's application.

Disturbance Reactions

Disturbance includes a variety of effects, including subtle changes in behavior, more conspicuous changes in activities, and displacement. Reactions to sound, if any, depend on species, state of maturity, experience, current activity, reproductive state, time of day, and many other factors (Richardson *et al.,* 1995; Wartzok *et al.,* 2004; Southall *et al.,* 2007; Weilgart, 2007). If a marine mammal responds to an underwater

sound by changing its behavior or moving a small distance, the response may or may not rise to the level of ''harassment,'' or affect the stock or the species as a whole. If a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on animals or on the stock or species could potentially be significant (Lusseau and Bejder, 2007; Weilgart, 2007). Given the many uncertainties in predicting the quantity and types of impacts of noise on marine mammals, it is common practice to estimate how many mammals are likely to be present within a particular distance of industrial activities, or exposed to a particular level of industrial sound. In most cases, this approach likely overestimates the numbers of marine mammals that are affected in some biologically-important manner.

The sound exposure thresholds that are used to estimate how many marine mammals might be disturbed to some biologically-important degree by a seismic program are based on behavioral observations during studies of several species. However, information is lacking for many species. Detailed studies have been done on humpback, gray, bowhead, and on ringed seals. Less detailed data are available for some other species of baleen whales, sperm whales, small toothed whales, and sea otters, but for many species there are no data on responses to marine seismic surveys. Most of those studies have concerned reactions to much larger airgun sources than planned for use in the proposed project. Thus, effects are expected to be limited to considerably smaller distances and shorter periods of exposure in the present project than in most of the previous work concerning marine mammal reactions to airguns.

Baleen Whales—Baleen whales generally tend to avoid operating airguns, but avoidance radii are quite variable. Whales are often reported to show no overt reactions to pulses from large arrays of airguns at distances beyond a few kilometers, even though the airgun pulses remain well above ambient noise levels out to much longer distances. However, as reviewed in Appendix A of Rice's application, baleen whales exposed to strong noise pulses from airguns often react by deviating from their normal migration route and/or interrupting their feeding activities and moving away from the sound source. In the case of the migrating gray and bowhead whales, the observed changes in behavior appeared to be of little or no biological consequence to the animals. They simply avoided the sound source by displacing their migration route to varying degrees, but within the natural boundaries of the migration corridors.

Studies of gray, bowhead, and humpback whales have demonstrated that received levels of pulses in the 160–170 dB re 1 μPa rms range seem to cause obvious avoidance behavior in a substantial fraction of the animals exposed. In many areas, seismic pulses from large arrays of airguns diminish to those levels at distances ranging from 4.5–14.5 km (2.8–9 mi) from the source. A substantial proportion of the baleen whales within those distances may show avoidance or other strong disturbance reactions to the airgun array. Subtle behavioral changes sometimes become evident at somewhat lower received levels, and studies summarized in Appendix A(5) of SIO's application have shown that some species of baleen whales, notably bowhead and humpback whales, at times show strong avoidance at received levels lower than 160–170 dB re 1 μPa (rms). Reaction distances would be considerably smaller during the proposed project, for which the 160 dB radius is predicted to be 220 to 570 m (722 to 1,870 ft) (see Table 1 above), as compared with several km when a large array of airguns is operating.

Responses of humpback whales to seismic surveys have been studied during migration, on the summer feeding grounds, and on Angolan winter breeding grounds; there has also been discussion of effects on the Brazilian wintering grounds. McCauley *et al.* (1998, 2000a) studied the responses of humpback whales off Western Australia to a full-scale seismic survey with a 16-airgun, 2,678 in^3 array, and to a single 20 in^3 airgun with a source level of 227 dB re 1 μPa m peak-to-peak. McCauley *et al.* (1998) documented that initial avoidance reactions began at 5 to 8 km (3.1 to 5 mi) from the array, and that those reactions kept most pods approximately 3 to 4 km (1.9 to 2.5 mi) from the operating seismic boat. McCauley *et al.* (2000) noted localized displacement during migration of 4 to 5 km (2.5 to 3.1 mi) by traveling pods and 7 to12 km (4.3 to 7.5 mi) by cow-calf pairs. Avoidance distances with respect to the single airgun were smaller (2 km (1.2 mi)) but consistent with the results from the full array in terms of received sound levels. The mean received level for initial avoidance reactions of an approaching airgun was a sound level of 140 dB re 1 μPa (rms) for humpback whale pods containing females. The standoff range, *i.e.,* the closest point of approach (CPA) of the whales to the airgun, corresponded to a received level of 143 dB re 1 μPa (rms). The initial avoidance response generally occurred at distances of 5 to 8 km (3.1 to 5 mi) from the airgun array and 2 km (1.2 mi) from the single airgun. However, some individual humpback whales, especially males, approached within distances of 100 to 400 m (328 to 1,312 ft), where the maximum received level was 179 dB re 1 μPa (rms).

Humpback whales on their summer feeding grounds in southeast Alaska did not exhibit persistent avoidance when exposed to seismic pulses from a 1.64–L (100 in^3) airgun (Malme *et al.,* 1985). Some humpbacks seemed ''startled'' at received levels of 150–169 dB re 1 μPa on an approximate rms basis. Malme *et al.* (1985) concluded that there was no clear evidence of avoidance, despite the possibility of subtle effects, at received levels up to 172 re 1 μPa on an approximate rms basis.

Among wintering humpback whales off Angola (n = 52 useable groups), there were no significant differences in encounter rates (sightings/hr) when a 24 airgun array (3,147 in^3 or 5,805 in^3) was operating vs. silent (Weir, 2008). There was also no significant difference in the mean CPA distance of the humpback whale sightings when airguns were on vs. off (3,050 m vs. 2,700 m or 10,007 vs. 8,858 ft, respectively).

It has been suggested that South Atlantic humpback whales wintering off Brazil may be displaced or even strand upon exposure to seismic surveys (Engel *et al.,* 2004). The evidence for this was circumstantial and subject to alternative explanations (IAGC, 2004). Also, the evidence was not consistent with subsequent results from the same area of Brazil (Parente *et al.,* 2006), or with results from direct studies of humpbacks exposed to seismic surveys in other areas and seasons. After allowance for data from subsequent years, there was ''no observable direct correlation'' between strandings and seismic surveys (IWC, 2007b:236).

There are no data on reactions of right whales to seismic surveys, but results from the closely-related bowhead whale show that their responsiveness can be quite variable depending on the activity (migrating vs. feeding). Bowhead whales migrating west across the Alaskan Beaufort Sea in autumn, in particular, are unusually responsive, with substantial avoidance occurring out to distances of 20–30 km (12.4–18.6 mi) from a medium-sized airgun source at received sound levels of around 120–130 dB re 1 μPa (rms) (Miller *et al.,* 1999; Richardson *et al.,* 1999; see Appendix A of Rice's EA). However, more recent research on bowhead whales (Miller *et al.,* 2005a; Harris *et al.,* 2007) corroborates earlier evidence that,

during the summer feeding season, bowheads are not as sensitive to seismic sources. Nonetheless, subtle but statistically significant changes in surfacing-respiration-dive cycles were evident upon statistical analysis (Richardson *et al.,* 1986). In summer, bowheads typically begin to show avoidance reactions at a received level of about 160–170 dB re 1 µPa (rms) (Richardson *et al.,* 1986; Ljungblad *et al.,* 1988; Miller *et al.,* 2005a).

Reactions of migrating and feeding (but not wintering) gray whales to seismic surveys have been studied. Malme *et al.* (1986, 1988) studied the responses of feeding Eastern Pacific gray whales to pulses from a single 100 in^3 airgun off St. Lawrence Island in the northern Bering Sea. Malme *et al.* (1986, 1988) estimated, based on small sample sizes, that 50 percent of feeding gray whales ceased feeding at an average received pressure level of 173 dB re 1 µPa on an (approximate) rms basis, and that 10 percent of feeding whales interrupted feeding at received levels of 163 dB. Those findings were generally consistent with the results of experiments conducted on larger numbers of gray whales that were migrating along the California coast (Malme *et al.,* 1984; Malme and Miles, 1985), and with observations of Western Pacific gray whales feeding off Sakhalin Island, Russia, when a seismic survey was underway just offshore of their feeding area (Gailey *et al.,* 2007; Johnson *et al.,* 2007; Yazvenko *et al.,* 2007a,b), along with data on gray whales off British Columbia (Bain and Williams, 2006). Gray whales typically show no conspicuous responses to airgun pulses with received levels up to 150 to 160 dB re 1 µPa (rms), but are increasingly likely to show avoidance as received levels increase above that range.

Various species of *Balaenoptera* (blue, sei, fin, Bryde's, and minke whales) have occasionally been reported in areas ensonified by airgun pulses (Stone, 2003; MacLean and Haley, 2004; Stone and Tasker, 2006). Sightings by observers on seismic vessels off the United Kingdom from 1997 to 2000 suggest that, at times of good sightability, sighting rates for mysticetes (mainly fin and sei whales) were similar when large arrays of airguns were shooting and not shooting (Stone, 2003; Stone and Tasker, 2006). However, these whales tended to exhibit localized avoidance, remaining significantly (on average) from the airgun array during seismic operations compared with non-seismic periods (Stone and Tasker, 2006). In a study off Nova Scotia, Moulton and Miller (2005) found little difference in sighting rates (after accounting for water depth) and initial sighting distances of balaenopterid whales when airguns were operating vs. silent. However, there were indications that these whales were more likely to be moving away when seen during airgun operations. Similarly, ship-based monitoring studies of blue, fin, sei, and minke whales offshore of Newfoundland (Orphan Basin and Laurentian Sub-basin) found no more than small differences in sighting rates and swim direction during seismic vs. non-seismic periods (Moulton *et al.,* 2005, 2006a,b).

Data on short-term reactions (or lack of reactions) of cetaceans to impulsive noises do not necessarily provide information about long-term effects. It is not known whether impulsive noises affect reproductive rate or distribution and habitat use in subsequent days or years. However, gray whales continued to migrate annually along the west coast of North America with substantial increases in the population over recent years, despite intermittent seismic exploration and much ship traffic in that area for decades (see Appendix A in Malme *et al.,* 1984; Richardson *et al.,* 1995; Angliss and Outlaw, 2008). The Western Pacific gray whale population did not seem affected by a seismic survey in its feeding ground during a prior year (Johnson *et al.,* 2007). Bowhead whales continued to travel to the eastern Beaufort Sea each summer, and their numbers have increased notably, despite seismic exploration in their summer and autumn range for many years (Richardson *et al.,* 1987). In any event, brief exposures to sound pulses from the proposed airgun source are highly unlikely to result in prolonged effects.

Toothed Whales—Little systematic information is available about reactions of toothed whales to noise pulses. Few studies similar to the more extensive baleen whale/seismic pulse work summarized above have been reported for toothed whales. However, systematic studies on sperm whales have been done (Jochens and Biggs, 2003; Tyack *et al.,* 2003; Jochens *et al.,* 2006; Miller *et al.,* 2006), and there is an increasing amount of information about responses of various odontocetes to seismic surveys based on monitoring studies (Stone, 2003; Smultea *et al.,* 2004; Moulton and Miller, 2005; Bain and Williams, 2006; Holst *et al.,* 2006; Stone and Tasker, 2006; Potter *et al.,* 2007; Weir, 2008).

Seismic operators and MMOs on seismic vessels regularly see dolphins and other small toothed whales near operating airgun arrays, but in general there seems to be a tendency for most delphinids to show some avoidance of operating seismic vessels (Goold, 1996a,b,c; Calambokidis and Osmek, 1998; Stone, 2003; Moulton and Miller, 2005; Holst *et al.,* 2006; Stone and Tasker, 2006; Weir, 2008). Some dolphins seem to be attracted to the seismic vessel and floats, and some ride the bow wave of the seismic vessel even when large airgun arrays are firing (Moulton and Miller, 2005). Nonetheless, there have been indications that small toothed whales sometimes tend to head away or to maintain a somewhat greater distance from the vessel when a large array of airguns is operating than when it is silent (Stone and Tasker, 2006; Weir, 2008). In most cases, the avoidance radii for delphinids appear to be small, on the order of 1 km (0.62 mi) or less, and some individuals show no apparent avoidance. Weir (2008b) noted that a group of short-finned pilot whales initially showed an avoidance response to ramp-up of a large airgun array, but that this response was limited in time and space.

The beluga is a species that (at least at times) shows long-distance avoidance of seismic vessels. Aerial surveys during seismic operations in the southeastern Beaufort Sea during summer recorded much lower sighting rates of beluga whales within 10–20 km (6.2–12.4 mi) compared with 20–30 km (mi) from an operating airgun array, and observers on seismic boats in that area rarely see belugas (Miller *et al.,* 2005a; Harris *et al.,* 2007).

Captive bottlenose dolphins and beluga whales exhibited changes in behavior when exposed to strong pulsed sounds similar in duration to those typically used in seismic surveys (Finneran *et al.,* 2000, 2002, 2005; Finneran and Schlundt, 2004). The animals tolerated high received levels of sound (pk–pk level >200 dB re 1 µPa) before exhibiting aversive behaviors. For pooled data at 3, 10, and 20 kHz, sound exposure levels during sessions with 25, 50, and 75 percent altered behavior were 180, 190, and 199 dB re 1 μPa^2, respectively (Finneran and Schlundt, 2004).

Results for porpoises depend on species. Dall's porpoises seem relatively tolerant of airgun operations (MacLean and Koski, 2005) and, during a survey with a large airgun array, tolerated higher noise levels than did harbor porpoises and gray whales (Bain and Williams, 2006). However, Dall's porpoises do respond to the approach of large airgun arrays by moving away (Calambokidis and Osmek, 1998; Bain and Williams, 2006). The limited

available data suggest that harbor porpoises show stronger avoidance (Stone, 2003; Bain and Williams, 2006; Stone and Tasker, 2006). This apparent difference in responsiveness of these two porpoise species is consistent with their relative responsiveness to boat traffic and some other acoustic sources in general (Richardson *et al.,* 1995; Southall *et al.* 2007).

Most studies of sperm whales exposed to airgun sounds indicate that this species shows considerable tolerance of airgun pulses (Stone, 2003; Moulton *et al.,* 2005, 2006a; Stone and Tasker, 2006; Weir, 2008). In most cases, the whales do not show strong avoidance and continue to call (see Appendix A of Rice's EA for review). However, controlled exposure experiments in the Gulf of Mexico indicate that foraging effort is somewhat altered upon exposure to airgun sounds (Jochens *et al.,* 2006, 2008). In the SWSS study, D-tags (Johnson and Tyack, 2003) were used to record the movement and acoustic exposure of eight foraging sperm whales before, during, and after controlled sound exposures of airgun arrays in the Gulf of Mexico (Jochens *et al.,* 2008). Whales were exposed to maximum received sound levels between 111 and 147 dB re 1 µPa (rms) (131 to 164 dB re 1 µPa pk–pk) at ranges of approximately 1.4 to 12. 6 km (0.9 to 7.8 mi) from the sound source. Although the tagged whales showed no horizontal avoidance, some whales changed foraging behavior during full array exposure (Jochens *et al.,* 2008).

Odontocete reactions to large arrays of airguns are variable and, at least for delphinids and Dall's porpoises, seem to be confined to a smaller radius than has been observed for the more responsive of the mysticetes, belugas, and harbor porpoises (Appendix A of Rice's application). Thus behavioral reactions of most odontocetes to the small GI airgun source to be used during the proposed survey are expected to be very localized.

Pinnipeds—In the event that any pinnipeds are encountered, they are not likely to show a strong avoidance reaction to the airgun array. Visual monitoring from seismic vessels has shown only slight (if any) avoidance of airguns by pinnipeds, and only slight (if any) changes in behavior (see Appendix A of Rice's application). In the Beaufort Sea, some ringed seals avoided an area of 100 m (at most) to a few hundred meters around seismic vessels, but many seals remained within 100 to 200 m of the trackline as the operating airgun array passed by (*e.g.,* Harris *et al.,* 2001; Moulton and Lawson, 2002; Miller *et al.,* 2005a). Ringed seal sightings averaged somewhat farther away from the seismic vessel when the airguns were operating than when they were not, but the difference was small (Moulton and Lawson, 2002). Similarly, in Puget Sound, sighting distances for harbor seals and California sea lions tended to be larger when airguns were operating (Calambokidis and Osmek, 1998). Previous telemetry work suggests that avoidance and other behavioral reactions may be stronger than evident to date from visual studies (Thompson *et al,* 1998). Nonetheless, reactions are expected to be confined to relatively small distances and durations, with no long-term effects on pinniped individuals or populations.

Additional details on the behavioral reactions (or the lack thereof) by all types of marine mammals to seismic vessels can be found in Appendix A of Rice's EA.

Hearing Impairment and Other Physical Effects

Temporary or permanent hearing impairment is a possibility when marine mammals are exposed to very strong sounds. Temporary threshold shift (TTS) has been demonstrated and studied in certain captive odontocetes (and pinnipeds) exposed to strong sounds (reviewed in Southall *et al.,* 2007). However, there has been no specific documentation of TTS let alone permanent hearing damage, *i.e.,* permanent threshold shift (PTS), in free-ranging marine mammals exposed to sequences of airgun pulses during realistic field conditions.

NMFS will be developing new noise exposure criteria for marine mammals that take account of the now-available scientific data on TTS, the expected offset between the TTS and PTS thresholds, differences in the acoustic frequencies to which different marine mammal groups are sensitive, and other relevant factors. Detailed recommendations for new science-based noise exposure criteria were published in late 2007 (Southall *et al.,* 2007).

Because of the small GI airgun source in this proposed project, along with the proposed monitoring and mitigation measures, there is little likelihood that any marine mammals will be exposed to sounds sufficiently strong enough to cause hearing impairment. Several aspects of the proposed monitoring and mitigation measures for this project (see below) are designed to detect marine mammals occurring near the airguns (and other sound sources), and to avoid exposing them to sound pulses that might, at least in theory, cause hearing impairment. In addition, many cetaceans and (to a limited degree) pinnipeds are likely to show some avoidance of the area where received levels of airgun sound are high enough such that hearing impairment could potentially occur. In those cases, the avoidance responses of the animals themselves will reduce or (most likely) avoid any possibility of hearing impairment.

Non-auditory physical effects may also occur in marine mammals exposed to strong underwater pulsed sound. Possible types of non-auditory physiological effects or injuries that theoretically might occur in mammals close to a strong sound source include stress, neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage. It is possible that some marine mammal species (*i.e.,* beaked whales) may be especially susceptible to injury and/or stranding when exposed to strong pulsed sounds. However, as discussed below, there is no definitive evidence that any of these effects occur even for marine mammals in close proximity to large arrays of airguns. It is especially unlikely that any effects of these types would occur during the proposed project given the small size of the source, the brief duration of exposure of any given mammal, and the proposed monitoring and mitigation measures (see below). The following subsections discuss in somewhat more detail the possibilities of TTS, PTS, and non-auditory physical effects.

Temporary Threshold Shift—TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises and a sound must be stronger in order to be heard. At least in terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days. For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound. Available data on TTS in marine mammals are summarized in Southall *et al.* (2007).

For toothed whales exposed to single short pulses, the TTS threshold appears to be, to a first approximation, a function of the energy content of the pulse (Finneran *et al.,* 2002, 2005). Given the available data, the received level of a single seismic pulse (with no frequency weighting) might need to be approximately 186 dB re 1 $\mu Pa^2 \cdot s$ (*i.e.,*

186 dB SEL or approximately 221–226 dB pk–pk) in order to produce brief, mild TTS. Exposure to several strong seismic pulses that each have received levels near 190 dB re 1 µPa (rms) (175–180 dB SEL) might result in cumulative exposure of approximately 186 dB SEL and thus slight TTS in a small odontocete, assuming the TTS threshold is (to a first approximation) a function of the total received pulse energy. The distances from the *Endeavor's* GI airguns at which the received energy level (per pulse, flat-weighted) would be expected to be ≥175–180 dB SEL are the distances shown in the 190 dB re 1 µPa (rms) column in Table 1 above (given that the rms level is approximately 10 to 15 dB higher than the SEL value for the same pulse). Seismic pulses with received levels ≥175 to 180 dB SEL (190 dB re 1 µPa (rms)) are expected to be restricted to radii no more than 150 m around the two GI airguns. The specific radius depends on the depth of the water. For an odontocete closer to the surface, the maximum radius with ≥ 190 dB 1 µPa (rms) would be smaller.

The above TTS information for odontocetes is derived from studies on the bottlenose dolphin and beluga. There is no published TTS information for other species of cetaceans. However, preliminary evidence from harbor porpoise exposed to airgun sound suggests that its TTS threshold may be lower (Lucke *et al.,* 2007).

For baleen whales, there are no data, direct or indirect, on levels or properties of sound required to induce TTS. The frequencies to which baleen whales are most sensitive are lower than those for odontocetes, and natural background noise levels at those low frequencies tend to be higher. As a result, auditory thresholds of baleen whales within their frequency band of best hearing are believed to be higher (less sensitive) than are those of odontocetes at their best frequencies (Clark and Ellison, 2004). From this, it is suspected that received levels causing TTS onset may also be higher in baleen whales (Southall *et al.,* 2007). In any event, no cases of TTS are expected given three considerations:

(1) Small size of the GI airgun source (90 in^3 total volume);

(2) The strong likelihood that baleen whales would avoid the approaching airguns (or vessel) before being exposed to levels high enough for TTS to possibly occur; and

(3) The proposed mitigation measures.

In pinnipeds, TTS thresholds associated with exposure to brief pulses (single or multiple) of underwater sound have not been measured. Initial evidence from prolonged (non-pulse) exposures suggested that some pinnipeds may incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations (Kastak *et al.,* 1999, 2005; Ketten *et al.,* 2001; Au *et al.,* 2000). The TTS threshold for pulsed sounds has been indirectly estimated as being an SEL of approximately 171 dB re 1 $\mu Pa^2 \cdot s$ (Southall *et al.,* 2007), which would be equivalent to a single pulse with received level approximately 181–186 re 1 µPa (rms), or a series of pulses for which the highest rms values are a few dB lower. Corresponding values for California sea lions and northern elephant seals are likely to be higher (Kastak *et al.,* 2005).

A marine mammal within a radius of less than 100 m (328 ft) around a typical large array of operating airguns might be exposed to a few seismic pulses with levels of greater than or equal to 205 dB, and possibly more pulses if the mammal moved with the seismic vessel. (As noted above, most cetacean species tend to avoid operating airguns, although not all individuals do so.) In addition, ramping up airgun arrays, which is standard operational protocol for large airgun arrays, should allow cetaceans to move away form the seismic source and to avoid being exposed to the full acoustic output of the airgun array. Even with a large airgun array, it is unlikely that the cetaceans would be exposed to airgun pulses at a sufficiently high level for a sufficiently long period to cause more than mild TTS, given the relative movement of the vessel and the marine mammal. The potential for TTS is much lower in this project. With a large array of airguns, TTS would be most likely in any odontocetes that bow-ride or otherwise linger near the airguns. While bow-riding, odontocetes would be at or above the surface, and thus not exposed to strong pulses given the pressure-release effect at the surface. However, bow-riding animals generally dive below the surface intermittently. If they did so while bow-riding near airguns, they would be exposed to strong sound pulses, possibly repeatedly. If some cetaceans did incur TTS through exposure to airgun sounds, this would very likely be mild, temporary, and reversible.

To avoid the potential for injury, NMFS has determined that cetaceans and pinnipeds should not be exposed to pulsed underwater noise at received levels exceeding, respectively, 180 and 190 dB re 1 µPa (rms). As summarized above, data that are now available imply that TTS is unlikely to occur unless odontocetes (and probably mysticetes as well) are exposed to airgun pulses stronger than 180 dB re 1 µPa (rms).

Permanent Threshold Shift—When PTS occurs, there is physical damage to the sound receptors in the ear. In severe cases, there can be total or partial deafness, while in other cases the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter, 1985).

There is no specific evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns. However, given the possibility that mammals close to an airgun array might incur TTS, there has been further speculation about the possibility that some individuals occurring very close to airguns might incur PTS (Richardson *et al.,* 1995). Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage.

Relationships between TTS and PTS thresholds have not been studied in marine mammals, but are assumed to be similar to those in humans and other terrestrial mammals. PTS might occur at a received sound level at least several decibels above that inducing mild TTS if the animal were exposed to strong sound pulses with rapid rise time (see Appendix A(5) of SIO's application). Based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds (such as airgun pulses as received close to the source) is at least 6 dB higher than the TTS threshold on a peak-pressure basis, and probably >6 dB (Southall *et al.,* 2007). On an SEL basis, Southall *et al.* (2007) estimated that received levels would need to exceed the TTS threshold by at least 15 dB for there to be risk of PTS. Thus, for cetaceans they estimate that the PTS threshold might be an M-weighted SEL (for the sequence of received pulses) of approximately 198 dB re 1 $\mu Pa^2 \cdot s$ (15 dB higher than the TTS threshold for an impulse). Additional assumptions had to be made to derive a corresponding estimate for pinnipeds, as the only available data on TTS thresholds in pinnipeds pertain to non-impulse sound. Southall *et al.* (2007) estimate that the PTS threshold could be a cumulative M_{pw}-weighted SEL of approximately 186 dB 1 $\mu Pa^2 \cdot s$ in the harbor seal to impulse sound. The PTS threshold for the California sea lion and northern elephant seal the PTS threshold would probably be higher, given the higher TTS thresholds in those species.

Southall *et al.* (2007) also note that, regardless of the SEL, there is concern about the possibility of PTS if a cetacean or pinniped receives one or more pulses with peak pressure exceeding 230 or 218 dB re 1 µPa (3.2 bar · m, 0-pk),

which would only be found within a few meters of the largest (600-in^3) airguns in the planned airgun array (Caldwell and Dragoset, 2000). A peak pressure of 218 dB re 1 µPa could be received somewhat farther away; to estimate that specific distance, one would need to apply a model that accurately calculates peak pressures in the near-field around an array of airguns.

In the proposed project employing two GI airguns, marine mammals are unlikely to be exposed to received levels of seismic pulses strong enough to cause TTS, as they would need to be quite close to the GI airguns for that to occur. Given the higher level of sound necessary to cause PTS as compared with TTS, it is considerably less likely that PTS could occur. A mammal would not be exposed to more than one strong pulse unless it swam immediately alongside the GI airguns for a period longer than the inter-pulse interval. Baleen whales generally avoid the immediate area around operating seismic vessels, as do some other marine mammals. The planned monitoring and mitigation measures, including visual monitoring and shut downs of the airguns when mammals are seen about to enter or within the exclusion zone (EZ), will further reduce the probability of exposure of marine mammals to sounds strong enough to induce PTS.

Non-auditory Physiological Effects—Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007). Studies examining such effects are limited. However, resonance (Gentry, 2002) and direct noise-induced bubble formation (Crum *et al.,* 2005) are not expected in the case of an impulsive source like an airgun array. If seismic surveys disrupt diving patterns of deep diving species, this might perhaps result in bubble formation and a form of ''the bends,'' as speculated to occur in beaked whales exposed to sonar. However, there is no specific evidence of this upon exposure to airgun pulses.

In general, little is known about the potential for seismic survey sounds to cause auditory impairment or other physical effects in marine mammals. Available data suggest that such effects, if they occur at all, would presumably be limited to short distances of the sound source and to activities that extend over a prolonged period. The available data do not allow identification of a specific exposure level above which non-auditory effects can be expected (Southall *et al.,* 2007), or any meaningful quantitative predictions of the numbers (if any) of marine mammals that might be affected in those ways. Marine mammals that show behavioral avoidance of seismic vessels, including most baleen whales, some odontocetes, and some pinnipeds, are especially unlikely to incur auditory impairment or non-auditory physical effects. Also, the planned mitigation measures, including shut downs of the airgun, would reduce any such effects that might otherwise occur.

Strandings and Mortality

Marine mammals close to underwater detonations of high explosives can be killed or severely injured, and their auditory organs are especially susceptible to injury (Ketten *et al.,* 1993; Ketten, 1995). However, explosives are no longer used for marine seismic research or commercial seismic surveys, and have been replaced entirely by airguns or related non-explosive pulse generators. Airgun pulses are less energetic and have slower rise times, and there is no specific evidence that they can cause injury, death, or stranding even in the case of large airgun arrays. However, the association of mass strandings of beaked whales with naval exercises and, in one case, an L–DEO seismic survey (Malakoff, 2002; Cox *et al.,* 2006), has raised the possibility that beaked whales exposed to strong ''pulsed'' sounds may be especially susceptible to injury and/or behavioral reactions that can lead to stranding (Hildebrand 2005; Southall *et al.,* 2007). Appendix A of Rice's application provides additional details.

Specific sound-related processes that lead to strandings and mortality are not well documented, but may include:

(1) Swimming in avoidance of a sound into shallow water;

(2) A change in behavior (such as a change in diving behavior) that might contribute to tissue damage, gas bubble formation, hypoxia, cardiac arrhythmia, hypertensive hemorrahage or other forms of trauma;

(3) A physiological change such as a vestibular response leading to a behavioral change or stress-induced hemorrahagic diathesis, leading in turn to tissue damage; and

(4) Tissue damage directly from sound exposure, such as through acoustically mediated bubble formation and growth or acoustic resonance of tissues.

As noted in Rice's application, some of these mechanisms are unlikely to apply in the case of impulse sounds. However, there are increasing indications that gas-bubble disease (analogous to ''the bends''), induced in super-saturated tissue by a behavioral response to acoustic exposure, could be a pathologic mechanism for the strandings and mortality of some deep diving cetaceans exposed to sonar. The evidence for this remains circumstantial and associated with exposure to naval mid-frequency sonar, not seismic surveys (Cox *et al.,* 2006; Southall *et al.,* 2007).

Seismic pulses and mid-frequency sonar pulses are quite different, and some mechanisms by which sonar sounds have been hypothesized to affect beaked whales are unlikely to apply to airgun pulses. Sounds produced by airgun arrays are broadband with most of the energy below 1 kHz. Typical military mid-frequency sonars operate at frequencies of 2–10 kHz, generally with a relatively narrow bandwidth at any one time. A further difference between seismic surveys and naval exercises is that naval exercises can involve sound sources on more than one vessel. Thus, it is not appropriate to assume that there is a direct connection between the effects of military sonar and seismic surveys on marine mammals. However, evidence that sonar pulses can, in special circumstances, lead (at least indirectly) to physical damage and mortality (Balcomb and Claridge, 2001; NOAA and USN, 2001; Jepson *et al.,* 2003; Fernández *et al.,* 2004, 2005a,b; Hildebrand, 2005; Cox *et al.,* 2006) suggests that caution is warranted when dealing with exposure of marine mammals to any high-intensity pulsed sound.

There is no conclusive evidence of cetacean strandings or deaths at sea as a result of exposure to seismic surveys, but a few cases of strandings in the general area where a seismic survey was ongoing have led to speculation concerning a possible link between seismic surveys and strandings. Suggestions that there was a link between seismic surveys and strandings of humpback whales in Brazil (Engel *et al.,* 2004) were not well founded based on available data (IAGC, 2004; IWC, 2006). In September 2002, there was a stranding of two Cuvier's beaked whales (*Ziphius cavirostris*) in the Gulf of California, Mexico, when the L–DEO vessel R/V *Maurice Ewing* (*Ewing*) was operating a 20 airgun, 8,490 in^3 array in the general area. The link between the stranding and the seismic survey was inconclusive and not based on any physical evidence (Hogarth, 2002; Yoder, 2002). Nonetheless, the Gulf of California incident plus the beaked whale strandings near naval exercises involving use of mid-frequency sonar

suggests a need for caution when conducting seismic surveys in areas occupied by beaked whales until more is known about effects of seismic surveys on those species (Hildebrand, 2005).

No injuries of beaked whales are anticipated during the proposed study because of (1) the high likelihood that any beaked whales nearby would avoid the approaching vessel before being exposed to high sound levels, (2) the proposed monitoring and mitigation measures, including avoiding submarine canyons, where deep diving species (like beaked whales and sperm whales) may congregate, and (3) differences between the sound sources operated by Rice and those involved in the naval exercises associated with strandings.

Potential Effects of Other Acoustic Devices

Echosounder Signals

The Knudsen echosounder will be operated from the source vessel during most of the proposed study. Sounds from the echosounder are short pulses, occurring for up to 24 ms once every few seconds. Most of the energy in the sound pulses is at 3.5 and 12 kHz, and the beam is directed downward. The source level of the echosounder is expected to be relatively low compared to the GI airguns. Kremser *et al.* (2005) noted that the probability of a cetacean swimming through the area of exposure when an echosounder emits a pulse is small, and if the animal was in the area, it would have to pass the transducer at close range in order to be subjected to sound levels that could cause TTS.

Marine mammal communications will not be masked appreciably by the echosounder signals given their directionality and the brief period when an individual mammal is likely to be within its beam. Furthermore, in the case of most baleen whales, the signals do not overlap with the predominant frequencies in the calls, which would avoid significant masking.

Behavioral reactions of free-ranging marine mammals to echosounders and other sound sources appear to vary by species and circumstance. Observed reactions have included silencing and dispersal by sperm whales (Watkins *et al.,* 1985), increased vocalizations and no dispersal by pilot whales (Rendell and Gordon, 1999), and the previously mentioned beaked whales. During exposure to a 21 to 25 kHz whale-finding sonar with a source level of 215 dB re 1 µPam, gray whales showed slight avoidance (approximately 200 m) behavior (Frankel, 2005). When a 38 kHz echosounder and a 150 kHz acoustic Doppler current profiler were transmitting during studies in the Eastern Tropical Pacific, baleen whales showed no significant responses, while spotted and spinner dolphins were detected slightly more often and beaked whales less often during visual surveys (Gerrodette and Pettis, 2005).

During a previous low-energy seismic survey from the R/V *Thomas G. Thompson,* several echosounders were in operation most of the time, and a fathometer was also used during part of the survey. Many cetaceans and small numbers of fur seals were seen by the observers aboard the ship, but no specific information about echosounder effects (if any) on mammals were obtained (Ireland *et al.,* 2005). These responses (if any) could not be distinguished from responses to the GI airguns (when operating) and to the ship itself.

Captive bottlenose dolphins and a beluga whale exhibited changes in behavior when exposed to 1 s pulsed sounds at frequencies of approximately 30 kHz and to shorter broadband pulsed signals. Behavioral changes typically involved what appeared to be deliberate attempts to avoid the sound exposure (Schlundt *et al.,* 2000; Finneran *et al.,* 2002; Finneran and Schlundt, 2004). The relevance of those data to free-ranging odontocetes is uncertain, and in any case, the test sounds were quite different in either duration or bandwidth as compared with those from an echosounder.

Very few data are available on the reactions of pinnipeds to echosounder sounds at frequencies similar to those used during seismic operations. Hastie and Janik (2007) conducted a series of behavioral response tests on two captive gray seals to determine their reactions to the underwater operation of a 375 kHz multi-beam imaging sonar that included significant signal components down to 6 kHz. Results indicated that the two seals reacted to the sonar signal by significantly increasing their dive durations. Based on observed pinniped responses to other types of pulsed sounds, and the likely brevity of exposure to the echosounder sounds, pinniped reactions are expected to be limited to startle or otherwise brief responses of no lasting consequence to the animals.

During the proposed operations, the individual pulses will be very short, and a given mammal would not receive many of the downward-directed pulses as the vessel passes by. In the case of baleen whales, the echosounder will operate at too high a frequency to have any effect.

Given recent stranding events that have been associated with the operation of naval sonar, there is concern that mid-frequency sonar sounds can cause serious impacts to marine mammals (see above). However, the echosounder proposed for use is quite different than sonars used for Navy operations. Pulse duration of the echosounder is very short relative to naval sonars. Also, at any given location, an individual marine mammal would be in the beam of the echosounder for much less time given the generally downward orientation; Navy sonars often use near-horizontally-directed sound.

Given the maximum source level of 211 dB re 1 µPam (rms), the received energy level from a single pulse of duration 24 ms would be approximately 195 dB re 1 $\mu Pa^2 \cdot s$ at 1 m, *i.e.,* 211 dB + 10 log (0.024 s). As the TTS threshold for a cetacean receiving a single non-impulse sound is 195 dB re 1 $\mu Pa^2 \cdot s$ and the anticipated PTS threshold is 215 dB re 1 $\mu Pa^2 \cdot s$ (Southall *et al.,* 2007), it is very unlikely that an animal would ever come close enough to the transducer to incur TTS (which would be fully recoverable), let alone PTS. As noted by Burkhardt *et al.* (2007, 2008), cetaceans are very unlikely to incur PTS from operation of scientific echosounders on a ship that is underway.

For the harbor seal, the TTS threshold for non-impulse sounds is approximately 183 dB re 1 $\mu Pa^2 \cdot s$, as compared with approximately 195 dB re 1 $\mu Pa^2 \cdot s$ in odontocetes (Kastak *et al.,* 2005; Southall *et al.,* 2007). TTS onset occurs at higher received energy levels in the California sea lion and northern elephant seal than in the harbor seal. The received level for a harbor seal within the echosounder beam 10 m below the ship would be approximately 191 dB re 1 µPam (rms), assuming 40 dB of spreading loss over 100 m (circular spreading). Given the narrow beam, only one pulse is likely to be received by a given animal as the ship passes overhead. At 10 m, the received energy level from a single pulse of duration 24 ms would be approximately 175 dB re 1 $\mu Pa^2 \cdot s$, *i.e.,* 191 dB + 10 log (0.024 s). Thus, a harbor seal would have to come very close to the transducer in order to receive a single echosounder pulse with a received energy level of ≥183 dB re 1 $\mu Pa^2 \cdot s$. Given the intermittent nature of the signals and the narrow echosounder beam, only a small fraction of the pinnipeds below (and close to) the ship would receive a pulse as the ship passed overhead. Thus, it seems unlikely that a pinniped would incur TTS, let alone PTS, is exposed to a single pulse by the echosounder.

Sub-Bottom Profiler Signals

A SBP will be operated from the source vessel at all times during the planned study. Sounds from the SBP are very short pulses, occurring for 30 ms once every 0.5 to 1 s. The SBP will transmit a 0.5–12 kHz swept pulse (or chirp). The source level of the SBP is expected to be similar to or less than that of the Knudsen echosounder. Kremser *et al.* (2005) noted that the probability of a cetacean swimming through the area of exposure when a SBP emits a pulse is small—if the animal was in the area, it would have to pass the transducer at close range in order to be subjected to sound levels that could cause TTS.

Marine mammal communications will not be masked appreciably by the SBP signals given their directionality and the brief period when an individual mammal is likely to be within its beam.

Marine mammal behavioral reactions to other pulsed sound sources are discussed above, and responses to the SBP are likely to be similar to those for other pulsed sources if received at the same levels. Therefore, behavioral responses are not expected unless marine mammals are very close to the source.

It is unlikely that the SBP produces pulse levels strong enough to cause hearing impairment or other physical injuries even in an animal that is (briefly) in a position near the source. The SBP is usually operated simultaneously with other higher-power acoustic sources. Many marine mammals will move away in response to the approaching higher-power sources or the vessel itself before the mammals would be close enough for there to be any possibility of effects from the less intense sounds from the SBP. In the case of mammals that do not avoid the approaching vessel and its various sound sources, mitigation measures that would be applied to minimize effects of other sources would further reduce or eliminate any minor effects of the SBP.

Boomer Signals

The boomer will be operated from the source vessel at times during the proposed study (see Acoustic Source Specifications above). Details about this boomer are provided in Rice's IHA application, see above. Sounds from the boomer are very short pulses, occurring for 0.1 ms once every second. The boomer will transmit a 0.3 to 3 kHz pulse. The source level of the boomer is similar to that of the Knudsen echosounder—212 dB re 1 μPam. If the animal was in the area, it would have to pass the transducer at close range in order to be subjected to sound levels that could cause TTS.

Marine mammal communications will not be masked appreciably by the boomer signals given the directionality and brief period when an individual mammal is likely to be within its beam.

Marine mammal behavioural reactions to other pulsed sound sources are discussed above, and responses to the boomer are likely to be similar to those for other pulsed sources if received at the same levels. Behavioral responses are not expected unless marine mammals are very close to the source.

It is unlikely that the boomer produces pulse levels strong enough to cause hearing impairment or other physical injuries even in an animal that is (briefly) in a position near the source. The boomer will be operated simultaneously with the higher-power GI airguns. Many marine mammals will move away in response to the approaching GI airguns or the vessel itself before the mammals will move away in response to the approaching GI airguns or the vessel itself before the mammals would be close enough for there to be any possibility of effects from the less intense sounds from the boomer. In the case of mammals that do not avoid the approaching vessel and its various sound sources, mitigation measures that would be applied to minimize effects of other sources would further reduce or eliminate any minor effects to the boomer.

As stated above, NMFS is assuming that Level A harassment onset corresponds to 180 and 190 dB re 1 μPa (rms) for cetaceans and pinnipeds, respectively. The precautionary nature of these criteria is discussed in Rice's application, including the fact that the minimum sound level necessary to cause permanent hearing impairment is higher, by a variable and generally unknown amount, than the level that induces barely-detectable TTS and the level associated with the onset of TTS is often considered to be a level below which there is no danger of permanent damage. NMFS also assumes that cetaceans or pinnipeds exposed to levels exceeding 160 re 1 μPa (rms) may experience Level B harassment.

Estimated Take by Incidental Harassment

All anticipated takes would be ''takes by harassment,'' involving temporary changes in behavior. The proposed monitoring and mitigation measures are expected to minimize the possibility of injurious takes. (However, as noted earlier and in Appendix A of Rice's application, there is no specific information demonstrating that injurious ''takes'' would occur even in the absence of the planned monitoring and mitigation measures.) The sections below describe methods to estimate ''take by harassment'', and present estimates of the numbers of marine mammals that might be affected during the proposed seismic program in the Northwest Atlantic Ocean. The estimates of ''take by harassment'' are based on (1) cetacean densities (numbers per unit area) obtained during aerial surveys off New England during 2002 and 2004 by NMFS Northeast Fisheries Science Center (NEFSC), and (2) estimates of the size of the area where effects could potentially occur. Few, if any, pinnipeds are expected to be encountered during the proposed survey in the summer.

The following estimates are based on a consideration of the number of marine mammals that might be disturbed appreciably by operations with the GI airgun to be used during approximately 1,757 line km (1,092 mi) of surveys (including turns) off the New England coast. The anticipated radii of influence of the other sound sources (*i.e.,* SBP, boomer system, and echosounder) are less than those for the GI airguns. It is assumed that, during simultaneous operations of the GI airguns and other sound sources, any marine mammals close enough to be affected by the other sound sources would already be affected by the GI airguns. However, whether or not the GI airguns are operating simultaneously with the other sound sources, marine mammals are expected to exhibit no more than short-term and inconsequential responses to the other sound sources given their characteristics (*e.g.,* narrow downward-directed beam in the echosounder). Therefore, no additional allowance is included for animals that could be affected by the other sound sources.

Extensive systematic aircraft and ship-based surveys have been conducted for marine mammals offshore from New England (*e.g.,* see Palka, 2006). Those that were conducted in the proposed seismic survey area were used for density estimates. Oceanographic conditions influence the distribution and numbers of marine mammals present in the study area, resulting in year-to-year variation in the distribution and abundance of many marine mammal species. Thus, for some species the densities derived from these surveys may not be representative of the densities that will be encountered during the proposed seismic survey. To provide some allowance for these uncertainties, ''maximum estimates'' as

well as ''best estimates'' of the numbers potentially affected have been derived. Best and maximum estimates are based on the average and maximum estimates of densities calculated from the appropriate densities reported by Palka (2006).

Table 4 of Rice's application gives the average and maximum densities for each species of cetacean reported in the proposed survey area off New England, corrected for effort, based on the densities as described above. The densities from those studies had been corrected, by the original authors, for both detectability bias and availability bias. Detectability bias associated with diminishing sightability with increasing lateral distance from the tracklines [$f(0)$]. Availability bias refers to the fact that there is less-than-100-percent probability of sighting an animal that is present along the survey trackline, and it is measured by g(0).

It should be noted that the following estimates of ''takes by harassment'' assume that the surveys will be undertaken and completed. As is typical on offshore ship surveys, inclement weather, and equipment malfunctions are likely to cause delays and may limit the number of useful line kms of seismic operations that can be undertaken. Furthermore, any marine mammal sightings within or near the designated safety zones will result in the shut-down of seismic operations as a mitigation measure. Thus, the following estimates of the numbers of marine mammals potentially exposed to 160 dB sounds are precautionary, and probably overestimate the actual numbers of marine mammals that might be involved. These estimates assume that there will be no weather, equipment, or mitigation delays, which is highly likely.

There is some uncertainty about the representativeness of the data and the assumptions used in the calculations. However, the approach used is believed to be the best available approach. Also, to provide some allowance for these uncertainties ''maximum estimates'' as well as ''best estimates'' of the numbers potentially affected have been derived. The estimated number of potential individuals exposed are presented below based on the 160 dB re 1 µPa (rms) criterion for all cetaceans and pinnipeds. It is assumed that a marine mammal exposed to airgun at that received level might change their behavior sufficiently to be considered ''taken by harassment.''

The number of different individuals that may be exposed to GI airgun sounds with received levels ≥160 dB re 1 µPa (rms) on one or more occasions was estimated by considering the total marine area that would be within the 160-dB radius around the operating airgun array on at least one occasion. The proposed seismic lines do not run parallel to each other in close proximity, which minimizes the number of times an individual mammal may be exposed during the survey. Table 5 of Rice's application shows the best and maximum estimates of the number of marine mammals that could potentially be affected during the seismic survey.

The number of different individuals potentially exposed to received levels ≥160 dB re 1 µPa (rms) was calculated by multiplying:

- The expected species density, either ''mean'' (*i.e.,* best estimate) or ''maximum,'' times;
- The anticipated area to be ensonified to that level during GI airgun operations.

The area expected to be ensonified was determined by entering the planned survey lines into a MapInfo Geographic Information System (GIS), using the GIS to identify the relevant areas by ''drawing'' the applicable 160 dB buffer around each seismic line (two GI airgun buffer) and turns (one GI airgun buffer) (depending on water and tow depth) and then calculating the total area within the buffers. Areas where overlap occurred (because of intersecting lines) were included only once to determine the area expected to be ensonified.

Applying the approach described above, approximately 2,877 km^2 (1,111 mi^2) would be within the 160 dB isopleth on one or more occasions during the survey. This approach does not allow for ''turnover'' in the mammal populations in the study area during the course of the studies. That might underestimate actual numbers of individuals exposed, although the conservative distances used to calculate the area may offset this. In addition, the approach assumes that no cetaceans will move away or toward the trackline as the *Endeavor* approaches in response to increasing sound levels prior to the time the levels reach 160 dB. Another way of interpreting the estimates that follow is that they represent the number of individuals that are expected (in the absence of a seismic survey) to occur in the waters that will be exposed to ≥160 dB re 1 µPa (rms).

TABLE 3

[The estimates of the possible numbers of marine mammals exposed to sound levels greater than or equal to 160 dB during Rice's proposed seismic survey off the coast of New England in August 2009. The proposed sound source is two GI airguns. Received levels are expressed in dB re 1 µPa (rms) (averaged over pulse duration), consistent with NMFS' practice. Not all marine mammals will change their behavior when exposed to these sound levels, but some may alter their behavior when levels are lower (see text). See Tables 3–5 in Rice's application for further detail.]

Species	Number of individuals exposed (best) [1]	Number of individuals exposed (max) [1]	Approx. % regional population (best) [2]
Mysticetes			
North Atlantic right whale [3] (*Eubalaena glacialis*)	1	1	0.31
Humpback whale (*Megaptera novaeangliae*)	2	57	0.02
Minke whale (*Balaenoptera acutorostrata*)	0	21	<0.01
Bryde's whale (*Balaenoptera brydei*)	0	0	0
Sei whale (*Balaenoptera borealis*)	0	0	0
Fin whale (*Balaenoptera physalus*)	11	75	0.02
Blue whale (*Balaenoptera musculus*)	0	0	0
Odontocetes			
Sperm whale (*Physeter macrocephalus*)	2	77	0.02
Pygmy sperm whale (*Kogia breviceps*)	0	0	0
Dwarf sperm whale (*Kogia sima*)	0	0	0
Cuvier's beaked whale (*Ziphius cavirostris*)	0	0	0
Northern bottlenose whale (*Hyperodon ampullatus*)	0	0	0
True's beaked whale (*Mesoplodon mirus*)	0	0	0

TABLE 3—Continued

[The estimates of the possible numbers of marine mammals exposed to sound levels greater than or equal to 160 dB during Rice's proposed seismic survey off the coast of New England in August 2009. The proposed sound source is two GI airguns. Received levels are expressed in dB re 1 μPa (rms) (averaged over pulse duration), consistent with NMFS' practice. Not all marine mammals will change their behavior when exposed to these sound levels, but some may alter their behavior when levels are lower (see text). See Tables 3–5 in Rice's application for further detail.]

Species	Number of individuals exposed (best) [1]	Number of individuals exposed (max) [1]	Approx. % regional population (best) [2]
Gervais' beaked whale (*Mesopldon europaeus*)	0	0	0
Sowerby's beaked whale (*Mesoplodon bidens*)	0	0	0
Blainville's beaked whale (*Mesoplodon densirostris*)	0	0	0
Unidentified beaked whale	0	2	N.A.
Bottlenose dolphin [3] (*Tursiops truncatus*)	39	4,700	0.05
Pantropical spotted dolphin (*Stenella attenuata*)	0	0	0
Atlantic spotted dolphin (*Stenella frontalis*)	0	0	0
Spinner dolphins (*Stenella longirostris*)	0	0	0
Striped dolphin (*Stenella coeruleoalba*)	0	212	<0.01
Common dolphin[5] (*Delphinus* sp.)	349	3,189	0.17
White-beaked dolphin (*Lagenorhynchus albirostris*)	0	0	0
Atlantic white-sided dolphin[3] (*Lagenorhynchus acutus*)	0	0	0
Risso's dolphin (*Grampus griseus*)	2	929	0.01
False killer whale (*Pseudorca crassidens*)	0	0	0
Killer whale (*Orcinus orca*)	0	0	0
Long-finned pilot whale (*Globicephala melas*)	N.A.	N.A.	<0.01
Short-finned pilot whale (*Globicephala macrorhynchus*)	N.A.	N.A.	<0.01
Unidentified pilot whale (*Globicephala* sp.)	10	1,101	<0.01
Harbor porpoise (*Phocoena phocoena*)	0	0	0
Pinnipeds			
Harbor seal [4] (*Phoca vitulina*)	10	N.A.	0.01
Gray seal (*Halichoerus grypus*)	5	N.A.	<0.01
Harp seal [4] (*Pagophilius groenlandicus*)	0	0	0
Hooded seal (*Cystophora cristata*)	0	0	0

N.A.—Data not available or species status was not assessed.
[1] Best estimate and maximum estimates of exposure are from Table 5 of Rice's application. Best and maximum density estimates are from Table 4 of Rice's application.
[2] Regional population size estimates are from Table 2 (above) and Table 2 of Rice's application.
[3] Species not sighted in the surveys used for density estimates, but that could occur in low densities in the proposed survey area.
[4] Species for which summer densities in the study area are unavailable, but could occur there in low numbers.
[5] Not identified to species level.

Table 5 of Rice's application shows the best and maximum estimates of the number of exposures and the number of individual marine mammals that potentially could be exposed to greater than or equal to 160 dB re 1 μPa (rms) during the different legs of the seismic survey if no animals moved away from the survey vessel.

The ''best estimate'' of the number of individual marine mammals that could be exposed to seismic sounds with received levels greater than or equal to 160 dB re 1 μPa (rms) (but below Level A harassment thresholds) during the survey is shown in Table 5 of Rice's application and Table 3 (shown above). That includes 1 North Atlantic right (0.31 percent of the regional population), 2 humpback (0.02 percent of the regional population), 11 fin (0.03 percent of the regional population), and 2 sperm whales (0.02 percent of the regional population), and no beaked whales. Based on the best estimates, most (93 percent) of the marine mammals potentially exposed are dolphins. The common dolphin and bottlenose dolphin are estimated to be the most common species exposed to 160 dB re μPa (rms); the best take estimates for those species are 349 (0.17 percent of the regional population) and 39 (0.05 percent of the regional population), respectively. Estimates for the other dolphin species that could be exposed are lower (see Table 5 of Rice's application). In addition, it is estimated that 10 harbor seals (0.01 percent) and 5 gray seals (<0.01 percent) may be exposed to sound levels greater than or equal to 160 dB re 1 μPa (rms).

The ''maximum estimate'' column of Table 5 of Rice's application shows an estimated total of 9,479 cetaceans exposed to seismic sounds ≥160 dB during the surveys. Those estimates are based on the highest calculated density in any survey stratum; in this case, the stratum with the highest density invariably was one of the areas where very little of the proposed seismic survey will take place, *i.e.,* Georges Central or Shelf Central. In other words, densities observed in the 2002 and 2004 aerial surveys were lowest in the Georges West operation area, where most of the proposed seismic surveys will take place. Therefore, the numbers for which ''take authorization'' is requested, given in the far right column of Table 5 of Rice's application, are the best estimates. For three endangered species, the best estimates were set at the species' mean group size. The North Atlantic right whale, which was not sighted during the aerial surveys, could occur in the survey area, and is usually seen individually (feeding aggregations are not expected to occur in the study area). The humpback and sperm whales, each of whose calculated best estimate was one, have a mean group size of two.

Potential Effects on Marine Mammal Habitat

The proposed Rice seismic survey will not result in any permanent impact on habitats used by marine mammals, or to the food sources they use. The main impact issue associated with the proposed activity will be temporarily elevated noise levels and the associated direct effects on marine mammals, as

described above. The following sections briefly review effects of airguns on fish and invertebrates, and more details are included in Rice's application and associated EA.

Potential Effects on Fish and Invertebrates

One reason for the adoption of airguns as the standard energy source for marine seismic surveys is that, unlike explosives, they have not been associated with large-scale fish kills. However, existing information on the impacts of seismic surveys on marine fish populations is very limited (see Appendix C of Rice's application). There are three types of potential effects on fish and invertebrates from exposure to seismic surveys: (1) Pathological, (2) physiological, and (3) behavioral. Pathological effects involve lethal and temporary or permanent sub-lethal injury. Physiological effects involve temporary and permanent primary and secondary stress responses, such as changes in levels of enzymes and proteins. Behavioral effects refer to temporary and (if they occur) permanent changes in exhibited behavior (*e.g.,* startle and avoidance behavior). The three categories are interrelated in complex ways. For example, it is possible that certain physiological and behavioral changes potentially could lead to an ultimate pathological effect on individuals (*i.e.,* mortality).

The specific received sound levels at which permanent adverse effects to fish potentially could occur are little studied and largely unknown. Furthermore, the available information on the impacts of seismic surveys on marine fish is from studies of individuals or portions of a population; there have been no studies at the population scale. Thus, available information provides limited insight on possible real-world effects at the ocean or population scale. This makes drawing conclusions about impacts on fish problematic because ultimately, the most important aspect of potential impacts relates to how exposure to seismic survey sound affects marine fish populations and their viability, including their availability to fisheries.

The following sections provide a general synopsis of available information on the effects of exposure to seismic and other anthropogenic sound as relevant to fish. The information comprises results from scientific studies of varying degrees of rigor plus some anecdotal information. Some of the data sources may have serious shortcomings in methods, analysis, interpretation, and reproducibility that must be considered when interpreting their results (see Hastings and Popper, 2005). Potential adverse effects of the program's sound sources on marine fish are then noted.

Pathological Effects—The potential for pathological damage to hearing structures in fish depends on the energy level of the received sound and the physiology and hearing capability of the species in question (see Appendix C of Rice's application). For a given sound to result in hearing loss, the sound must exceed, by some specific amount, the hearing threshold of the fish for that sound (Popper, 2005). The consequences of temporary or permanent hearing loss in individual fish on a fish population is unknown; however, it likely depends on the number of individuals affected and whether critical behaviors involving sound (*e.g.,* predator avoidance, prey capture, orientation and navigation, reproduction, *etc.*) are adversely affected.

Little is known about the mechanisms and characteristics of damage to fish that may be inflicted by exposure to seismic survey sounds. Few data have been presented in the peer-reviewed scientific literature. As far as we know, there are only two valid papers with proper experimental methods, controls, and careful pathological investigation implicating sounds produced by actual seismic survey airguns with adverse anatomical effects. One such study indicated anatomical damage and the second indicated TTS in fish hearing. The anatomical case is McCauley *et al.* (2003), who found that exposure to airgun sound caused observable anatomical damage to the auditory maculae of pink snapper (*Pagrus auratus*). This damage in the ears had not been repaired in fish sacrificed and examined almost two months after exposure. On the other hand, Popper *et al.* (2005) documented only TTS (as determined by auditory brainstem response) in two of three fish species from the Mackenzie River Delta. This study found that broad whitefish (*Coreogonus nasus*) that received a sound exposure level of 177 dB re 1 $\mu Pa^2 \cdot s$ showed no hearing loss. During both studies, the repetitive exposure to sound was greater than would have occurred during a typical seismic survey. However, the substantial low-frequency energy produced by the airgun arrays [less than approximately 400 Hz in the study by McCauley *et al.* (2003) and less than approximately 200 Hz in Popper *et al.* (2005)] likely did not propagate to the fish because the water in the study areas was very shallow (approximately 9 m in the former case and less than 2 m in the latter). Water depth sets a lower limit on the lowest sound frequency that will propagate (the ''cutoff frequency'') at about one-quarter wavelength (Urick, 1983; Rogers and Cox, 1988).

Wardle *et al.* (2001) suggested that in water, acute injury and death of organisms exposed to seismic energy depends primarily on two features of the sound source: (1) The received peak pressure, and (2) the time required for the pressure to rise and decay. Generally, as received pressure increases, the period for the pressure to rise and decay decreases, and the chance of acute pathological effects increases. According to Buchanan *et al.* (2004), for the types of seismic airguns and arrays involved with the proposed program, the pathological (mortality) zone for fish and invertebrates would be expected to be within a few meters of the seismic source. Numerous other studies provide examples of no fish mortality upon exposure to seismic sources (Falk and Lawrence, 1973; Holliday *et al.,* 1987; La Bella *et al.,* 1996; Santulli *et al.,* 1999; McCauley *et al.,* 2000a,b, 2003; Bjarti, 2002; Hassel *et al.,* 2003; Popper *et al.,* 2005).

Some studies have reported, some equivocally, that mortality of fish, fish eggs, or larvae can occur close to seismic sources (Kostyuchenko, 1973; Dalen and Knutsen, 1986; Booman *et al.,* 1996; Dalen *et al.,* 1996). Some of the reports claimed seismic effects from treatments quite different from actual seismic survey sounds or even reasonable surrogates. Saetre and Ona (1996) applied a 'worst-case scenario' mathematical model to investigate the effects of seismic energy on fish eggs and larvae. They concluded that mortality rates caused by exposure to seismic surveys are so low, as compared to natural mortality rates, that the impact of seismic surveying on recruitment to a fish stock must be regarded as insignificant.

Physiological Effects—Physiological effects refer to cellular and/or biochemical responses of fish to acoustic stress. Such stress potentially could affect fish populations by increasing mortality or reducing reproductive success. Primary and secondary stress responses of fish after exposure to seismic survey sound appear to be temporary in all studies done to date (Sverdrup *et al.,* 1994; McCauley *et al.,* 2000a, 2000b). The periods necessary for the biochemical changes to return to normal are variable, and depend on numerous aspects of the biology of the species and of the sound stimulus (see Appendix C of Rice's application).

Summary of Physical (Pathological and Physiological) Effects—As indicated in the preceding general discussion,

there is a relative lack of knowledge about the potential physical (pathological and physiological) effects of seismic energy on marine fish and invertebrates. Available data suggest that there may be physical impacts on egg, larval, juvenile, and adult stages at very close range. Considering typical source levels associated with commercial seismic arrays, close proximity to the source would result in exposure to very high energy levels. Whereas egg and larval stages are not able to escape such exposures, juveniles and adults most likely would avoid it. In the case of eggs and larvae, it is likely that the numbers adversely affected by such exposure would not be that different from those succumbing to natural mortality. Limited data regarding physiological impacts on fish and invertebrates indicate that these impacts are short term and are most apparent after exposure at close range.

The proposed seismic program for 2009 is predicted to have negligible to low physical effects on the various stags of fish and invertebrates for its relatively short duration (approximately 15 days) and unique survey lines extent. Therefore, physical effects of the proposed program on fish and invertebrates would not be significant.

Behavioral Effects—Behavioral effects include changes in the distribution, migration, mating, and catchability of fish populations. Studies investigating the possible effects of sound (including seismic survey sound) on fish behavior have been conducted on both uncaged and caged individuals (Chapman and Hawkins, 1969; Pearson *et al.,* 1992; Santulli *et al.,* 1999; Wardle *et al.,* 2001; Hassel *et al.,* 2003). Typically, in these studies fish exhibited a sharp ''startle'' response at the onset of a sound followed by habituation and a return to normal behavior after the sound ceased.

The existing body of information on the impacts of seismic survey sound on marine invertebrates is very limited. However, there is some unpublished and very limited evidence of the potential for adverse effects on invertebrates, thereby justifying further discussion and analysis of this issue. The three types of potential effects of exposure to seismic surveys on marine invertebrates are pathological, physiological, and behavioral. Based on the physical structure of their sensory organs, marine invertebrates appear to be specialized to respond to particle displacement components of an impinging sound field and not to the pressure component (Popper *et al.,* 2001; see Appendix D of Rice's application).

The only information available on the impacts of seismic surveys on marine invertebrates involves studies of individuals; there have been no studies at the population scale. Thus, available information provides limited insight on possible real-world effects at the regional or ocean scale. The most important aspect of potential impacts concerns how exposure to seismic survey sound ultimately affects invertebrate populations and their viability, including availability to fisheries.

The following sections provide a synopsis of available information on the effects of exposure to seismic survey sound on species of decapod crustaceans and cephalopods, the two taxonomic groups of invertebrates on which most such studies have been conducted. The available information is from studies with variable degrees of scientific soundness and from anecdotal information. A more detailed review of the literature on the effects of seismic survey sound on invertebrates is provided in Appendix D of Rice's application.

Pathological Effects—In water, lethal and sub-lethal injury to organisms exposed to seismic survey sound could depend on at least two features of the sound source: (1) The received peak pressure, and (2) the time required for the pressure to rise and decay. Generally, as received pressure increases, the period for the pressure to rise and decay decreases, and the chance of acute pathological effects increases. For the single GI gun planned for the proposed program, the pathological (mortality) zone for crustaceans and cephalopods is expected to be within a few meters of the seismic source; however, very few specific data are available on levels of seismic signals that might damage these animals. This premise is based on the peak pressure and rise/decay time characteristics of seismic airgun arrays currently in use around the world.

Some studies have suggested that seismic survey sound has a limited pathological impact on early developmental stages of crustaceans (Pearson *et al.,* 1994; Christian *et al.,* 2003; DFO, 2004). However, the impacts appear to be either temporary or insignificant compared to what occurs under natural conditions. Controlled field experiments on adult crustaceans (Christian *et al.,* 2003, 2004; DFO, 2004) and adult cephalopods (McCauley *et al.,* 2000a,b) exposed to seismic survey sound have not resulted in any significant pathological impacts on the animals. It has been suggested that exposure to commercial seismic survey activities has injured giant squid (Guerra *et al.,* 2004), but there is no evidence to support such claims.

Physiological Effects—Physiological effects refer mainly to biochemical responses by marine invertebrates to acoustic stress. Such stress potentially could affect invertebrate populations by increasing mortality or reducing reproductive success. Any primary and secondary stress responses (*i.e.,* changes in haemolymph levels of enzymes, proteins, *etc.*) of crustaceans after exposure to seismic survey sounds appear to be temporary (hours to days) in studies done to date (Payne *et al.,* 2007). The periods necessary for these biochemical changes to return to normal are variable and depend on numerous aspects of the biology of the species and of the sound stimulus.

Behavioral Effects—There is increasing interest in assessing the possible direct and indirect effects of seismic and other sounds on invertebrate behavior, particularly in relation to the consequences for fisheries. Change in behavior could potentially affect such aspects as reproductive success, distribution, susceptibility to predation, and catchability by fisheries. Studies investigating the possible behavioral effect of exposure to seismic survey sound on crustaceans and cephalopods have been conducted on both uncaged and caged animals. In some cases, invertebrates exhibiting startle responses (*e.g.,* squid in McCauley *et al.,* 2000a,b). In other cases, no behavioral impacts were noted (*e.g.,* crustaceans in Christian *et al.,* 2003, 2004; DFO, 2004). There have been anecdotal reports of reduced catch rates of shrimp shortly after exposure to seismic surveys; however, other studies have not observed any significant changes in shrimp and catch rate (Andriguetto-Filho *et al.,* 2005). Any adverse effects on crustacean and cephalopod behavior or fisheries attributable to seismic survey sound depend on the species in question and the nature of the fishery (season, duration, fishing method).

Because of the reasons noted above and the nature of the proposed activities, the proposed operations are not expected to cause significant impacts on habitats that could cause significant or long-term consequences for individual marine mammals or their populations or stocks. Similarly, any effects to food sources are expected to be negligible.

Subsistence Activities

There is no subsistence hunting for marine mammals in the waters off of the

coast of New England that implicates MMPA Section 101(a)(5)(D).

Proposed Mitigation and Monitoring

Mitigation and monitoring measures proposed to be implemented for the proposed seismic survey have been developed and refined during previous NSF-funded seismic studies and associated environmental assessments (EAs), IHA applications, and IHAs. The mitigation and monitoring measures described herein represent a combination of procedures required by past IHAs for other similar projects and on recommended best practices in Richardson *et al.* (1995), Pierson *et al.* (1998), and Weir and Dolman (2007). The measures are described in detail below.

Mitigation measures proposed for the survey include:

(1) Speed or course alteration, provided that doing so will not compromise operational safety requirements;

(2) GI airgun shut-down procedures;

(3) GI airgun power-downs procedures (including turns);

(4) GI airgun ramp-up procedures;

(5) Procedures for species of particular concern, *e.g.,* emergency shut-down procedures if a North Atlantic right whale is sighted at any distance, and concentrations of humpback, fin, sperm, blue, and/or sei whales will be avoided.

The thresholds for estimating take are also used in connection with proposed mitigation. The radii in Table 2 (above) will be used as shut-down criteria for the other sound sources (single GI airgun, watergun, and boomer), all of which have lower source levels than the two GI airguns.

Vessel-Based Visual Monitoring

Marine Mammal Visual Observers (MMVOs) will be based aboard the seismic source vessel and will watch for marine mammals near the vessel during daytime GI airgun operations and during start-ups of airguns at night. MMVOs will also watch for marine mammals near the seismic vessel for at least 30 minutes prior to the start of airgun operations and after an extended shut-down of the airguns. When feasible MMVOs will also make observations during daytime periods when the seismic system is not operating for comparison of sighting rates and animal behavior with vs. without GI airgun operations. Based on MMVO observations, the GI airgun will be shut-down (see below) when marine mammals are detected within or about to enter a designated EZ. The EZ is an area in which a possibility exists of adverse effects on animal hearing or other physical effects (see Table 1 above for the isopleths as they correspond to the relevant EZs). The MMVOs will continue to maintain watch to determine when the animal(s) are outside the safety radius, and airgun operations will not resume until the animal has left that zone. The predicted distances for the safety radius are listed according to the sound source, water depth, and received isopleths in Table 1.

MMVOs will be appointed by the academic institution conducting the research cruise, with NMFS Office of Protected Resources concurrence. During seismic operations off the coast of New England, a total of three MMVOs are planned to be aboard the *Endeavor.* At least one MMVO will monitor the EZ during daytime GI airgun operations and any nighttime startups of the airguns. MMVOs will normally work in daytime shifts of 4 hour duration or less. The vessel crew will also be instructed to assist in detecting marine mammals and implementing mitigation measures (if practical). Before the start of the seismic survey the crew will be given additional instruction regarding how to do so.

The *Endeavor* is a suitable platform from which MMVOs will conduct marine mammal observations. Two locations are likely as observation stations onboard the *Endeavor*; observations may take place from the flying bridge approximately 11 m (36 ft) above sea level or the bridge (8.2 m or 27 ft).

During the daytime, the MMVO(s) will scan the area around the vessel systematically with standard equipment such as reticle binoculars (*e.g.,* 7x50), optical range finders, and with the naked eye. During darkness, night vision devices (NVDs) will be available, when required. Vessel lights and/or NVDs are useful in sightings some marine mammals at the surface within a short distance from the ship (within the EZ for the two GI airguns). The MMVOs will be in wireless communication with ship's officers on the bridge and scientists in the vessel's operations laboratory, so they can advise promptly of the need for avoidance maneuvers or GI airgun shut-down.

Speed or Course Alteration—If a marine mammal is detected outside the EZ, but is likely to enter based on its position and the relative movement of the vessel and animal, then if safety and scientific objectives allow, the vessel speed and/or course may be adjusted to minimize the likelihood of the animal entering the EZ. Typically, during seismic operations, major course and speed adjustments are often impractical when towing long seismic streamers and large source arrays, but are possible in this case because only two GI airguns and a relatively short streamer will be used.

Shut-down Procedures—The operating airgun(s) will be shut-down if a marine mammal is detected within or approaching the EZ for the GI airgun source. Following a shut-down, GI airgun activity will not resume until the marine mammal is outside the EZ for the two GI airguns. The animal will be considered to have cleared the EZ if it:

- Is visually observed to have left the EZ;
- Has not been seen within the EZ for 10 min in the case of species with shorter dive durations—small odontocetes and pinnipeds; and
- Has not been seen within the EZ for 15 min in the case of species with longer dive durations—mysticetes and large odontocetes, including sperm, pygmy sperm, dwarf sperm, killer, and beaked whales;

The 10 and 15 min periods specified above are shorter than would be used in a large-source project given the small 180 and 190 dB (rms) radii for the two GI airguns.

Power-down Procedures—A power-down involves decreasing the number of GI airguns in use from two to one. During turns between successive survey lines, a single GI airgun will be operated. The continued operation of one airgun is intended to alert marine mammals to the presence of the survey vessel in the area.

Ramp-up Procedures—A ramp-up procedure will be followed when the GI airguns begin operating after a specified period without GI airgun operations. It is proposed that, for the present cruise, this period would be approximately five minutes. This period is based on the 180 dB radii for the GI airguns (see Table 1 above) in relation to the planned speed of the *Endeavor* while shooting.

Ramp-up will begin with a single GI airgun (45 in^3). The second GI airgun (45 in^3) will be added after five min. During ramp-up, the MMVOs will monitor the EZ, and if marine mammals are sighted, a shut-down will be implemented as though both GI airguns were operational.

If the complete EZ has not been visible for at least 30 min prior to the start of operations in either daylight or nighttime, ramp-up will not commence. If one GI airgun has been operating, ramp-up to full power will be permissible at night or in poor visibility, on the assumption that marine mammals will be alerted to the

approaching seismic vessel by the sounds from the single GI airgun and have an opportunity to move away if they choose. A ramp-up from a shut-down may occur at night, but only in intermediate-water depths, where the safety radius is small enough to be visible. Ramp-up of the GI airguns will not be initiated if a marine mammal is sighted within or near the applicable EZs during the day or close to the vessel at night.

Procedures for Species of Particular Concern—Several species of concern could occur in the study area. Special mitigation procedures will be used for these species as follows:

(1) The GI airguns will be shut-down if a North Atlantic right whale is sighted at any distance from the vessel;

(2) Concentrations or groups of humpback, fin, sperm, blue, and/or sei whales will be avoided.

A typical ''concentration or group'' of whales for this survey consists of three or more individuals visually sighted. If a concentration or group of the whale species listed above is sighted and does not appear to be traveling (*i.e.* feeding, socializing), then Rice will avoid them by implementing a power-down or shut-down, delay seismic operations, or move to another area for seismic data acquisition. If the concentration or group of whales appears to be traveling, then Rice will power-down or shut-down seismic operations and wait for approximately 30 min for the individuals to move out of the study area before re-initiating seismic operations. Rice and NSF will coordinate their planned marine mammal monitoring program associated with the seismic survey off the coast of New England with applicable U.S. agencies (*e.g.,* NMFS), and will comply with their requirements.

Proposed Reporting

MMVO Data and Documentation

MMVOs will record data to estimate the numbers of marine mammals exposed to various received sound levels and to document apparent disturbance reactions or lack thereof. Data will be used to estimate numbers of animals potentially ''taken'' by harassment. They will also provide information needed to order a shut-down of the seismic source when a marine mammal is within or near the EZ.

When a sighting is made, the following information about the sighting will be recorded:

(1) Species, group size, and age/size/sex categories (if determinable); behavior when first sighted and after initial sighting; heading (if consistent), bearing, and distance from seismic vessel; sighting cue; apparent reaction to the seismic source or vessel (*e.g.,* none, avoidance, approach, paralleling, *etc.*); and behavioral pace.

(2) Time, location, heading, speed, activity of the vessel, sea state, visibility, and sun glare.

The data listed (time, location, *etc.*) will also be recorded at the start and end of each observation watch, and during a watch whenever there is a change in one or more of the variables.

All observations, as well as information regarding seismic source shut-down, will be recorded in a standardized format. Data accuracy will be verified by the MMVOs at sea, and preliminary reports will be prepared during the survey and summaries forwarded to the Rice's shore facility and to NSF weekly or more frequently. MMVO observations will provide the following information:

(1) The basis for decisions about shutting-down airgun arrays.

(2) Information needed to estimate the number of marine mammals potentially ''taken by harassment.''

(3) Data on the occurrence, distribution, and activities of marine mammals in the area where the seismic study is conducted.

(4) Data on the behavior and movement patterns of marine mammals seen at times with and without seismic activity.

A report will be submitted to NMFS within 90 days after the end of the cruise. The report will describe the operations that were conducted and sightings of marine mammals near the operations. The report will be submitted to NMFS, providing full documentation of methods, results, and interpretation pertaining to all monitoring. The 90-day report will summarize the dates and locations of seismic operations, and all marine mammal sightings (dates, times, locations, activities, associated seismic survey activities). The report will also include estimates of the amount and nature of potential ''take'' of marine mammals by harassment or in other ways.

All injured or dead marine mammals (regardless of cause) will be reported to NMFS as soon as practicable. The report should include species or description of animal, condition of animal, location, time first found, observed behaviors (if alive) and photo or video, if available.

Endangered Species Act (ESA)

Under Section 7 of the ESA, NSF has begun consultation with the NMFS, Office of Protected Resources, Endangered Species Division on this proposed seismic survey. NMFS will also consult on the issuance of an IHA under section 101(a)(5)(D) of the MMPA for this activity. Consultation will be concluded prior to a determination on the issuance of the IHA.

National Environmental Policy Act (NEPA)

NSF has prepared a draft EA titled ''Marine Seismic Survey in the Northwest Atlantic Ocean, August 2009.'' NSF's draft EA incorporates an ''Environmental Assessment (EA) of a Marine Geophysical Survey by the R/V *Endeavor* in the Northwest Atlantic Ocean, August 2009,'' prepared on behalf of NSF and Rice by LGL Limited, Environmental Research Associates. NMFS will either adopt NSF's EA or conduct a separate NEPA analysis, as necessary, prior to making a determination on the issuance of the IHA.

Preliminary Determinations

NMFS has preliminarily determined that the impact of conducting the low-energy marine seismic survey in the Northwest Atlantic Ocean may result, at worst, in a temporary modification in behavior (Level B harassment) of small numbers of marine mammals. Further, this activity is expected to result in a negligible impact on the affected species or stocks. The provision requiring that the activity not have an unmitigable impact on the availability of the affected species or stock for subsistence uses is not implicated for this proposed action.

For reasons stated previously in this document, this determination is supported by:

(1) The likelihood that, given sufficient notice through relatively slow ship speed, marine mammals are expected to move away from a noise source that is annoying prior to its becoming potentially injurious;

(2) The fact that cetaceans would have to be closer than 40 m (131 ft) in deep water, 60 m (197 ft) in intermediate depths, and 296 m (971 ft) in shallow water when the two GI airguns are in use from the vessel to be exposed to levels of sound (180 dB) believed to have even a minimal chance of causing PTS;

(3) The fact that pinnipeds would have to closer than 10 m (33 ft) in deep water, 15 m (49 ft) in intermediate depths, and 147 m (482 ft) in shallow water when the two GI airguns are in use from the vessel to be exposed to levels of sound (190 dB) believed to have even a minimal chance of causing PTS;

(4) The fact that cetaceans would have to be closer than 23 m (76 ft) in deep

water, 35 m (115 ft) in intermediate depths, and 150 m (492 ft) in shallow water when the single GI airgun is in use from the vessel to be exposed to levels (180 dB) believed to have even a minimal chance of causing PTS;

(5) The fact that pinnipeds would have closer than 8 m (26 ft) in deep water, 12 m (39 ft) in intermediate depths, and 95 m (312 ft) in shallow water when the single GI airgun is in use from the vessel to be exposed to levels (190 dB) believed to have even a minimal chance of causing PTS.

(6) The fact that marine mammals would have to be closer than 350 m (1,148 ft) in deep water, 525 m (1,722 ft) at intermediate depths, and 1,029 m (3,376 ft) in shallow water when the two GI airguns are in use from the vessel to be exposed to levels of sound (160 dB) believed to have even a minimal chance at causing TTS;

(7) The fact that marine mammals would have to be closer than 220 m (721 ft) in deep water, 330 m (1,083 ft) at intermediate depths, and 570 m (1,870 ft) in shallow water when the single GI airgun is in use from the vessel to be exposed to levels of sound (160 dB) believed to have even a minimal chance at causing TTS; and

(8) The likelihood that marine mammal detection ability by trained observers is high at those short distances from the vessel and will trigger shut-downs to prevent injury, and due to the implementation of the other mitigation measures such as ramp-ups. As a result, no take by injury or death is anticipated, and the potential for temporary or permanent hearing impairment is very low and will be avoided through the incorporation of the proposed mitigation measures.

While the number of marine mammals potentially incidentally harassed will depend on the distribution and abundance of marine mammals in the vicinity of the survey activity, the number of potential harassment takings is estimated to be small, less than a few percent of any of the estimated population sizes, and has been mitigated to the lowest level practicable through incorporation of the measures mentioned previously in this document.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to Rice for conducting a low-energy marine seismic survey in the Northwest Atlantic Ocean in August, 2009, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: June 12, 2009.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9–14380 Filed 6–17–09; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Action Affecting Export Privileges; TAK Components, Inc.

In the Matter of:

TAK Components, Inc., 2140 Fulham Dr., Apt. 18, Naperville, IL 60564, Respondent.

Mr. Saied Shahsavarani, President, 2140 Fulham Dr., Apt. 18, Naperville, IL 60564, Related Person.

Order Denying Export Privileges

A. Denial of Export Privileges of TAK Components, Inc.

On October 11, 2007, in the U.S. District Court for the Northern District of Illinois, TAK Components, Inc. (''TAK'') pled guilty to and was convicted of 16 counts of violating the International Emergency Economic Powers Act (50 U.S.C. 1701–1706 (2000)) (''IEEPA''). Specifically, TAK pled guilty to willfully exporting and transferring, and causing to be exported and transferred, from the United States to Iran, via the United Arab Emirates, replacement and service parts and equipment for agricultural machinery, without first having obtained the required authorization from the Department of Treasury's Office of Foreign Assets Control. TAK was sentenced to one year probation per count (to run concurrently), ordered to pay a special assessment of $400.00 per count (for a total special assessment of $6,400.00), and forfeited approximately $181,000 that had been obtained from the transactions.

Section 766.25 of the Export Administration Regulations (''EAR'' or ''Regulations'') [1] provides, in pertinent part, that ''[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the [Export Administration Act (''EAA'')], the EAR, or any order, license or authorization issued thereunder; any regulation, license, or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)), or section 38 of the Arms Export Control Act (22 U.S.C. 2778).'' 15 CFR 766.25(a); *see also* Section 11(h) of the EAA, 50 U.S.C. app. 2410(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); see also 50 U.S.C. app. 2410(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security's Office of Exporter Services may revoke any Bureau of Industry and Security (''BIS'') licenses previously issued in which the person had an interest in at the time of his conviction.

I have received notice of TAK's conviction for violating the IEEPA, and have provided notice and an opportunity for TAK to make a written submission to BIS, as provided in Section 766.25 of the Regulations. I have not received a submission from TAK. Based upon my review and consultations with BIS's Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny TAK's export privileges under the Regulations for a period of five years from the date of TAK's conviction. I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which TAK had an interest at the time of its conviction.

B. Denial of Export Privileges of Related Person

Pursuant to Sections 766.25(h) and 766.23 of the Regulations, the Director of BIS's Office of Exporter Services, in consultation with the Director of BIS's Office of Export Enforcement, may take action to name persons related to a Respondent by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business in order to prevent evasion of a denial order. Saied Shahsavarani (''Shahsavarani'') was the corporate president and registered agent of TAK responsible for all aspects of TAK's day-to-day operations. Shahsavarani pled guilty to Count 17 of the information, 18.U.S.C. 1960(a), for knowingly aiding and abetting the operation of an unlicensed money transmitting business. Shahsavarani is related to TAK by ownership, control, position of responsibility, affiliation, or other

[1] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR Parts 730–774 (2009). The Regulations issued pursuant to the EAA, which is currently codified at 50 U.S.C. app. 2401–2420 (2000). Since August 21, 2001, the EAA has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of July 23, 2008 (73 FR 43603, July 25, 2008), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706 (2000)).

connection in the conduct of trade or business. BIS believes that naming Shahsavarani as a person related to TAK is necessary to avoid evasion of the denial order against TAK.

As provided in Section 766.23 of the Regulations, I gave notice to Shahsavarani that his export privileges under the Regulations could be denied for up to 10 years due to his relationship with TAK and that BIS believes naming him as a person related to TAK would be necessary to prevent evasion of a denial order imposed against TAK. In providing such notice, I gave Shahsavarani an opportunity to oppose his addition to the TAK Denial Order as a related party. Having received no submission from Shahsavarani, I have decided, following consultations with BIS's Office of Export Enforcement, including its Director, to name Shahsavarani as a Related Person to the TAK Denial Order, thereby denying him export privileges for five years from the date of TAK's conviction.

I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which the Related Person had an interest at the time of TAK's conviction. The five-year denial period will end on October 11, 2012.

Accordingly, *it is hereby ordered*

I. Until October 11, 2012, TAK Components, Inc., 2140 Fulham Dr., Apt. 18, Naperville, IL 60564, when acting for or on behalf of TAK, its successors or assigns, agents or employees, (''the Denied Person'') and the following person related to the Denied Person as defined by Section 766.23 of the Regulations: Saied Shahsavarani, President, 2140 Fulham Dr., Apt. 18, Naperville, IL 60564, and when acting for or on his behalf, employees, agents or representatives, (''the Related Person'') (together, the Denied Person and the Related Person are ''Persons Subject to This Order'') may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

II. No person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Persons Subject To This Order any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Persons Subject To This Order of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Persons Subject To This Order acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Persons Subject To This Order of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Persons Subject To This Order in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Persons Subject To This Order, or service any item, of whatever origin, that is owned, possessed or controlled by the Persons Subject To This Order if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

III. In addition to the Related Person named above, after notice and opportunity for comment as provided in section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to the Denied Person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order if necessary to prevent evasion of the Order.

IV. This Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

V. This Order is effective immediately and shall remain in effect until October 11, 2012.

VI. In accordance with Part 756 of the Regulations, TAK may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

VII. In accordance with Part 756 of the Regulations, the Related Person may also file an appeal of this Order with the Under Secretary of Commerce for Industry and Security.

VIII. A copy of this Order shall be delivered to the Denied Person and the Related Person. This Order shall be published in the **Federal Register**.

Entered this 10th day of June 2009.

Bernard Kritzer,

Director, Office of Exporter Services.

[FR Doc. E9–14315 Filed 6–17–09; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, Department of Commerce.

ACTION: Notice and opportunity for public comment.

Pursuant to Section 251 of the Trade Act of 1974 (19 U.S.C. 2341 *et seq.*), the Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance from the firms listed below. EDA has initiated separate investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each firm contributed importantly to the total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION OF ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT

[5/18/2009 through 6/10/2009]

Firm	Address	Date accepted for filing	Products
Promark International, Inc	1268 Humbracht Circle, Bartlett, IL 60103–1631.	5/20/2009	Professional photographic and video lighting equipment and accessories.
Ultra Tool & Manufacturing, Inc.	W169 N5954 Ridgewood, Menominee, WI 3051.	5/19/2009	Metal stampings and tooling for precision metal stamping applications.
Accent Windows, Inc	12300 Pecos St., Westminster, CO 80234.	5/19/2009	Windows and doors are custom designed and manufactured from vinyl, wood, metal, and glass on-site.
Black Gold International, LLC	2280 SW 70th Avenue, Davie, FL 33317.	5/20/2009	Men's formal wear accessories, principal materials include fabric, woven yarns, and buttons.
Martin Door Manufacturing	2828 S 900 W, Salt Lake, UT 84119.	5/20/2009	Steel garage doors and related products.
Swanson Group Manufacturing, LLC.	2695 Glendale Valley Road, Glendale, OR 97442–9715.	5/20/2009	Plywood/veneer and dimensional lumber.
Rochester Shoe Tree Company, Inc.	One Cedar Lane, Ashland, NH 03217.	5/21/2009	Aromatic red cedar shoe trees, shoe care products, red cedar gifts and display trees.
H&J Investments dba Custom Engineering.	8558 Miramar Place, San Diego, CA 92121.	5/21/2009	Plastic injection molding of short to medium run production parts, and specialization in hybrid aluminum molds used for injection molding.
Wendell August Forge, Inc	620 Madison Avenue, PO, Grove City, PA 16127.	5/21/2009	Hand-wrought ornamental ironware and aluminum and pewter giftware.
Columbia Gem House, Inc	12507 NE 95th Street, Vancouver, WA 98682.	5/22/2009	Silver and gold jewelry with cut gemstones of many varieties.
Tracy Glover Objects and Lighting, Inc.	1655 Elmwood Ave., Cranston, RI 02910.	5/19/2009	Tracy Glover Objects and Lighting, Inc. manufactures and sells hand-blown glass lighting fixtures, objects and furniture hardware.
Ricardo E. Gomez, Inc. dba Professional.	770 Market Avenue, Richmond, CA 94801–1303.	5/31/2009	A wide range of interior and exterior finishes to individual customer specifications. Sandblasting, silkscreening, liquid or powder coating in a wide range of materials, inspection, packing and shipping.
WITCO, Inc.	6401 Bricker Road, Avoca, MI 48006.	6/3/2009	Machined components with and without threads.
International Packaging Corporation.	517 Mineral Spring Avenue, Pawtucket, RI 02860.	5/19/2009	Jewelry boxes which range in style from covered metal boxes to plastic and cardboard boxes, along with hanging cards and jewelry pads. They also manufacture point-of-purchase displays made from wood and plexi-glass. Jewelry accessory products range from puff pads that hold jewelry to sewn and heat seal products.
Mid-West Screw Products, Inc	3523 N. Kenton Ave., Chicago, IL 60641.	5/22/2009	Machined metal high and low voltage connectors, mechanical fasteners, screws and turned metal parts.
Ripano Stoneworks Ltd	90 East Hollis Street, Nashua, NH 03060.	5/22/2009	Custom stone slab work including: kitchen counters, bathroom vanities, shower walls, tub surrounds, fireplaces, reception desks and furniture tops.
Silbond Corporation	9901 Sand Creek Hwy., Weston, MI 49289.	5/22/2009	Chemical additives for coatings to provide adhesive properties and other industrial inorganic chemicals.
Advanced Energy Industries, Inc.	1625 Sharp Point Drive, Fort Collins, CO 80525.	5/27/2009	Electrical power, gas and liquid flow management systems for solar cell, semiconductor and other processes.
Annex Precision	800 Mathew Street, Suite, Santa Clara, CA 95050.	5/29/2009	High precision parts manufactured from various materials including all types of plastics, steels, aluminum, copper, and brass.
Aero Parts Manufacturing & Repair, Inc.	431 Rio Rancho Boulevard, Rio Rancho, NM 81724.	6/3/2009	Airplane parts for commercial and military aircraft, and provides service and repair on airplane parts.
Skol Manufacturing Company	4444 N. Ravenswood Ave., Chicago, IL 60640.	5/29/2009	Precision stamped, formed and welded parts and assemblies.
Body Balance System, LLC	3834 Commerce Loop, Orlando, FL 32808–3818.	5/18/2009	Ionic detoxification foot bath systems, sound therapy systems, and blood therapy systems.
ABBA Plastics, Inc.	207 Beaver Street, Yorkville, IL 60650.	5/31/2009	Custom plastic parts.

Any party having a substantial interest in these proceedings may request a public hearing on the matter. A written request for a hearing must be submitted to the Office of Performance Evaluation, Room 7009, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than ten (10) calendar days following publication of this notice. Please follow the procedures set forth in Section 315.9 of EDA's final rule (71 FR 56704) for procedures for requesting a public hearing. The Catalog of Federal Domestic Assistance official program number and title of the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance.

Dated: June 9, 2009.

William P. Kittredge,

Program Officer for TAA.

[FR Doc. E9–14316 Filed 6–17–09; 8:45 am]

BILLING CODE 3510–24–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before July 20, 2009.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or send e-mail to *oira_submission@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: June 15, 2009.

Angela C. Arrington,

Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: Extension.

Title: Federal Perkins Loan Program/ National Direct Student Loan (NDSL) Assignment Form.

Frequency: On occasion.

Affected Public: Businesses or other for-profit; not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 21,262.
Burden Hours: 8,505.

Abstract: The Federal Perkins Loan Program allows for assignment of certain defaulted loans from schools to the Department of Education for continued collection efforts when the school has exhausted all of its efforts in recovering an outstanding loan. The Perkins Assignment Form serves as the transmittal document in the assignment of such loans to the Federal Government.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4009. When you access the information collection, click on ''Download Attachments '' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E9–14318 Filed 6–17–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Postsecondary Education; Overview Information; Promoting Postbaccalaureate Opportunities for Hispanic Americans (PPOHA) Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2009

Catalog of Federal Domestic Assistance (CFDA) Number: 84.031M.

Dates:

Applications Available: June 18, 2009.

Deadline for Transmittal of Applications: July 20, 2009.

Deadline for Intergovernmental Review: September 16, 2009.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Promoting Postbaccalaureate Opportunities for Hispanic Americans (PPOHA) Program provides grants to: (1) Expand postbaccalaureate educational opportunities for, and improve the academic attainment of, Hispanic students; and (2) expand the postbaccalaureate academic offerings as well as enhance the program quality in the institutions of higher education that are educating the majority of Hispanic college students and helping large numbers of Hispanic and low-income students complete postsecondary degrees.

PPOHA Program Requirements

Background: The PPOHA Program is a new program established under sections 511 through 514 of the Higher Education Act of 1965, as amended (HEA). The PPOHA Program supports Hispanic-serving institutions that offer a postbaccalaureate certificate or degree granting program. To define the term ''Hispanic-serving institution'' for purposes of the PPOHA Program, Congress adopted the definition of that term in the existing Hispanic-Serving Institutions (HSI) Program authorized by sections 501 to 504 of the HEA. In addition, the PPOHA Program provides development grants like the HSI Program. Moreover, Congress also applied the general provisions of the HSI Program to the PPOHA Program. *See* Title V, Part C, sections 521–528, of the HEA. In light of the overlap of these definitions and requirements, the Secretary has determined that it is appropriate to adopt some of the regulatory requirements relating to eligibility criteria and tie-breaking factors from the HSI Program for use for the first grant competition in the PPOHA Program.

Eligibility Criteria (Use of 34 CFR 606.2(a) and (b), 606.3 through 606.5). For purposes of the PPOHA Program, an eligible institution is an institution of higher education that: (1) Is an Hispanic-serving institution as defined in section 502 of the HEA; and (2) offers a postbaccalaureate certificate or degree granting program. As noted earlier in this notice, the term ''Hispanic-serving institution'' under section 502 of the HEA has already been defined in the regulations for the HSI Program. For the competition announced in this notice, the Secretary has decided to use the specific eligibility criteria for Hispanic-serving institution in 34 CFR 606.2(a) and (b) and 606.3, 606.4 and 606.5 of those regulations. The use of these

regulations will enable applicants to determine whether they meet the definitional requirements of an Hispanic-serving institution under this program.

Tie-breaker for Development Grants (Use of 34 CFR 606.23(b)(1) and (b)(2)). The PPOHA Program will be providing Development Grants like those currently awarded under the HSI Program. In light of the similar eligibility criteria for these two programs, the Secretary has decided to adopt for this first PPOHA Program competition the regulations for tie-breakers used in the HSI Program. These tie-breaker regulations are set forth in the *Review and Selection Process* section of this notice (section v.2.b.).

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed program requirements. Section 437(d)(1) of GEPA, however, allows the Secretary to exempt from rulemaking requirements, regulations governing the first grant competition under a new or substantially revised program authority. This is the first grant competition for this program under section 511 through 514 of the Higher Education Act of 1965, as amended (HEA), and therefore qualifies for this exemption. In order to ensure timely grant awards, the Secretary has decided to forego public comment on using the eligibility criteria from 34 CFR 606.2(a) (except (a)(2)) and (b) and 606.3 through 606.5 and the tie-breaker for development grants regulations from 34 CFR 606.23(b)(1) and (b)(2) for the PPOHA Program. These eligibility criteria and regulations will apply to the PPOHA Program FY 2009 grant competition only.

Program Authority: 20 U.S.C. 1102–1102c.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 82, 84, 85, 86, 97, 98, and 99. (b) 34 CFR 606.2(a) (except (a)(2)) and (b), 606.3, 606.4, 606.5, and 606.23(b)(1) and (b)(2).

II. Award Information

Type of Award: Discretionary grant.

Estimated Available Funds: $11,500,000.

Estimated Range of Awards: $385,000–575,000.

Estimate Average Size of Awards: $500,000 (for an Individual Development Grant).

Maximum Awards: We will not fund any application for a PPOHA Program individual development grant at an amount exceeding $575,000 for a single budget period of 12 months. During our initial review of applications, we may choose not to further consider or review an application with a budget that exceeds the maximum amount. The Assistant Secretary for Postsecondary Education may change the maximum amount through a notice published in the **Federal Register.**

Estimated Number of Awards: 23 Individual Development Grants.

Note: The Department is not bound by any estimates in this notice. Applicants should periodically check the PPOHA Program Web site for further information. The address is: *http://www.ed.gov/programs/ppoha/index.html.*

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* Institutions of higher education (IHEs) that offer a postbaccalaureate certificate or postbaccalaureate degree program and qualify as eligible Hispanic-serving institutions (HSIs) under section 502 of the HEA. To qualify as an eligible HSI for the PPOHA Program under section 502 of the HEA, an IHE must—

(a) Have an enrollment of needy students, as required by section 502(b) of the HEA (20 U.S.C. 1101a(a)(2)(A)(i));

(b) Have, except as provided in section 522(b) of the HEA, average educational and general expenditures that are low, per full-time equivalent (FTE) undergraduate student, in comparison with the average educational and general expenditures per full-time equivalent undergraduate student of institutions that offer similar instruction (20 U.S.C. 1101a(a)(2)(A)(ii));

Note: To demonstrate an enrollment of needy students (paragraph (a) of this section) and low average educational and general expenditures per FTE undergraduate student (paragraph (b) of this section), an IHE must be designated as an ''eligible institution'' in accordance with 34 CFR 606.3 through 606.5 and the notice inviting applications for Designation as Eligible Institutions for FY 2009 (74 FR 3579).

(c) Be accredited by a nationally recognized accrediting agency or association that the Secretary has determined to be a reliable authority as to the quality of education or training offered, or is making reasonable progress toward accreditation, according to such an agency or association (20 U.S.C. 1101a(a)(2)(A)(iv));

(d) Be legally authorized to provide, and provides within the State, an educational program for which the institution awards a bachelor's degree (20 U.S.C. 1101a(a)(2)(A)(iii)); and

(e) Have an enrollment of undergraduate FTE students that is at least 25 percent Hispanic students at the end of the award year immediately preceding the date of application (20 U.S.C. 1101a(a)(5)(B)).

Note 1: Funds for the PPOHA Program will be awarded each fiscal year; thus, for this program, the ''end of the award year immediately preceding the date of application'' refers to the end of the fiscal year prior to the application due date. The end of the fiscal year occurs on September 30 for any given year. Therefore, for purposes of making the determination described in paragraph (e) of this section, IHEs must report their undergraduate Hispanic FTE percent based on the student enrollment count closest to, but not after, September 30, 2008.

Note 2: In considering applications for grants under this program, the Department will compare the data and documentation the institution relied on in its application with data reported to the Department's Integrated Postsecondary Education Data System (IPEDS), the IHE's State-reported enrollment data, and the institutional annual report. If different percentages or data are reported in these various sources, the institution must, as part of the eligibility process, explain the reason for the differences. If the IPEDS data show that less than 25 percent of the institution's undergraduate full-time equivalent (FTE) students are Hispanic, the burden is on the institution to show that the IPEDS data are inaccurate. If the IPEDS data indicate that the institution has an undergraduate FTE less than 25 percent, and the institution fails to demonstrate that the IPEDS data are inaccurate, the institution will be considered ineligible.

Note 3: As noted elsewhere in this notice, to be eligible for a grant under the PPOHA Program, an institution must be designated as an eligible institution under 34 CFR 606.5. For this competition, the Notice Inviting Applications for Designation as Eligible Institutions for FY 2009 was published in the **Federal Register** on January 21, 2009 (74 FR 3579), and the deadline for applications was February 20, 2009. Only institutions that submitted the required application and received designation through that process are eligible to submit an application for this competition.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Other:* An eligible HSI will not be awarded more than one Individual Development Grant under the PPOHA Program (20 U.S.C. 1101c(c)).

IV. Application and Submission Information

1. *Address To Request Application Package:* Dr. Maria E. Carrington, U.S. Department of Education, 1990 K Street, NW., Room 6033, Washington, DC 20006–8513. Telephone: (202) 502–7548 or by e-mail: *Maria.Carrington@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the

Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: The application narrative (Part III) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We have established mandatory page limits for the PPOHA Program—Individual Development Grant application. You must limit the section of the narrative that addresses the selection criteria to no more than 50 pages, using the following standards:

• A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.

• Double space (no more than three lines per vertical inch) all text in the application narrative, *except* titles, headings, footnotes, quotations, references, captions, and all text in charts, tables, figures, and graphs, which may be single-spaced.

• Use a font that is either 12 point or larger; or, no smaller than 10 pitch (characters per inch).

• Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman and Arial Narrow) will not be accepted.

The page limit does not apply to the cover sheet; the budget section, including the budget narrative justification; the assurances and certifications, or the one-page abstract.

We will reject your application if you exceed the page limit.

3. *Submission Dates and Times:*

Applications Available: June 18, 2009.

Deadline for Transmittal of Applications: July 20, 2009.

Applications for grants under this program must be submitted electronically using the Electronic Grant Application site (e-Application) accessible through the Department's e-Grants system. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV.6. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accessible or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: September 16, 2009.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section in this notice.

6. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Promoting Postbaccalaureate Opportunities for Hispanic Americans Program—CFDA Number 84.031M must be submitted electronically using e-Application, accessible through the Department's e-Grants Web site at: *http://e-grants.ed.gov.*

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

While completing your electronic application, you will be entering data online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

• You must complete the electronic submission of your grant application by 4:30:00 p.m., Washington, DC time, on the application deadline date. E–Application will not accept an application for this program after 4:30:00 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.

• The hours of operation of the e-Grants Web site are 6:00 a.m. Monday until 7:00 p.m. Wednesday; and 6:00 a.m. Thursday until 8:00 p.m. Sunday, Washington, DC time. Please note that, because of maintenance, the system is unavailable between 8:00 p.m. on Sundays and 6:00 a.m. on Mondays, and between 7:00 p.m. on Wednesdays and 6:00 a.m. on Thursdays, Washington, DC time. Any modifications to these hours are posted on the e-Grants Web site.

• You will not receive additional point value because you submit your application in electronic format nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password protected file, we will not review that material.

• Your electronic application must comply with any page limit requirements described in this notice.

• Prior to submitting your electronic application, you may wish to print a copy of it for your records.

• After you electronically submit your application, you will receive an automatic acknowledgment that will include a PR/Award number (an identifying number unique to your application).

• Within three working days after submitting your electronic application, fax a signed copy of the SF 424 to the

Application Control Center after following these steps:

(1) Print SF 424 from e-Application.

(2) The applicant's Authorizing Representative must sign this form.

(3) Place the PR/Award number in the upper right hand corner of the hard-copy signature page of the SF 424.

(4) Fax the signed SF 424 to the Application Control Center at (202) 245–6272.

• We may request that you provide us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of e-Application Unavailability: If you are prevented from electronically submitting your application on the application deadline date because e-Application is unavailable, we will grant you an extension of one business day to enable you to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) You are a registered user of e-Application and you have initiated an electronic application for this competition; and

(2)(a) E-Application is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) E-Application is unavailable for any period of time between 3:30 p.m. and 4:30:00 p.m., Washington, DC time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgment of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (see VII. Agency Contact) or (2) the e-Grants help desk at 1–888–336–8930. If e-Application is unavailable due to technical problems with the system and, therefore, the application deadline is extended, an e-mail will be sent to all registered users who have initiated an e-Application. Extensions referred to in this section apply only to the unavailability of e-Application.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement and may submit your application in paper format if you are unable to submit an application through e-Application because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to e-Application; and

• No later than two weeks before the application deadline date (14 calendar days; or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Dr. Maria E. Carrington, U.S. Department of Education, 1990 K Street, NW., Room 6033, Washington, DC 20006–8513. FAX: (202) 502–7861.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.031M), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.031M), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this grant notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from section 75.210 of the Education Department General Administrative Regulations (EDGAR) (34 CFR 75.210) and are as follows. Applicants must address each of the selection criteria (separately for each proposed activity). The total weight of the selection criteria is 100 points; the weight of each criterion is noted in parentheses.

(a) *Need for project.* (Maximum 20 points) In determining the need for the proposed project, the Secretary considers:

(i) The magnitude of the need for the services to be provided or the activities to be carried out by the proposed project. (10 points)

(ii) The extent to which the proposed project will focus on serving or otherwise addressing the needs of disadvantaged individuals. (5 points)

(iii) The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the

nature and magnitude of those gaps or weaknesses. (5 points)

(b) *Quality of the project design.* (Maximum 15 points) In determining the quality of the design of the proposed project, the Secretary considers:

(i) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable. (10 points)

(ii) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs. (5 points)

(c) *Quality of project services.* (Maximum 15 points) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. In addition, the Secretary considers:

(i) The extent to which the services to be provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services. (10 points)

(ii) The extent to which the services to be provided by the proposed project reflect up-to-date knowledge from research and effective practice. (5 points)

(d) *Quality of project personnel.* (Maximum 10 points) In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. In addition, the Secretary considers:

(i) The qualifications, including relevant training and experience, of the project director or principal investigator. (5 points)

(ii) The qualifications, including relevant training and experience, of key project personnel. (5 points)

(e) *Adequacy of resources.* (Maximum 5 points) In determining the adequacy of resources for the proposed project, the Secretary considers:

(i) The extent to which the budget is adequate to support the proposed project. (3 points)

(ii) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project. (2 points)

(f) *Quality of the management plan.* (Maximum 20 points) In determining the quality of the management plan for the proposed project, the Secretary considers:

(i) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks. (10 points)

(ii) The adequacy of procedures for ensuring feedback and continuous improvement in the operation of the proposed project. (5 points)

(iii) The adequacy of mechanisms for ensuring high-quality products and services from the proposed project. (5 points)

(g) *Quality of the project evaluation.* (Maximum 15 points) In determining the quality of the evaluation, the Secretary considers:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project. (5 points)

(ii) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible. (5 points)

(iii) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes. (5 points)

2. *Review and Selection Process:*

(a) Applicants must provide, as an attachment to the application, the documentation the institution relied upon in determining that at least 25 percent of the institution's undergraduate FTE students are Hispanic.

Note: The 25 percent requirement applies only to undergraduate Hispanic students and is calculated based upon FTE students. Instructions for formatting and submitting the verification documentation to e-Application are in the application package for this competition.

(b) Tie-breaker for Development Grants. In tie-breaking situations for development grants, the Department will award one additional point to an application from an IHE that has an endowment fund for which the market value per FTE student is less than the comparable average per FTE student at a similar type IHE. We will also award one additional point to an application from an IHE that had expenditures for library materials per FTE student that are less than the comparable average per FTE student at a similar type IHE. (34 CFR 606.23(b)(1) and (b)(2))

For the purpose of these funding considerations, we will use 2006–2007 data.

If a tie remains after applying the tie-breaker mechanism above, priority will be given for Individual Development Grants to applicants that have the lowest endowment values per FTE student. (34 CFR 606.23(b)(1))

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section in this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The Secretary has established the following key performance measures for assessing the effectiveness of the PPOHA Program:

(a) The percentage change, over the five-year grant period, of the number of full-time degree-seeking graduate and professional students enrolled at HSIs currently receiving an award under this program.

(b) The percentage change, over the five-year grant period, of the number of master's, doctoral and first-professional degrees, and postbaccalaureate certificates awarded at HSIs currently receiving an award under this program.

(c) Cost per successful outcome: Federal cost per master's degree,

doctoral and first-professional degree, and post baccalaureate certificate at HSIs currently receiving an award under this program.

VII. Agency Contacts

For Further Information Contact: Dr. Maria E. Carrington, U.S. Department of Education, 1990 K Street, NW., Room 6033, Washington, DC 20006–8513. Telephone: (202) 502–7548 or by e-mail: *Maria.Carrington@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register,** in text or Adobe Portable Document Format (PDF), on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

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Delegation of Authority: The Secretary of Education has delegated authority to Daniel T. Madzelan, Director, Forecasting and Policy Analysis for the Office of Postsecondary Education, to perform the functions of the Assistant Secretary for Postsecondary Education.

Dated: June 15, 2009.

Daniel T. Madzelan,

Director, Forecasting and Policy Analysis.

[FR Doc. E9–14357 Filed 6–17–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[CFDA Nos. 84.007, 84.032, 84.033, 84.038, 84.063, 84.069, 84.268, 84.375, 84.376, and 84.379]

Student Assistance General Provisions, Federal Supplemental Educational Opportunity Grant, Federal Family Education Loan, Federal Work-Study, Federal Perkins Loan, Federal Pell Grant, Leveraging Educational Assistance Partnership, William D. Ford Federal Direct Loan, Academic Competitiveness Grant, National Science and Mathematics Access To Retain Talent Grant, and Teacher Education Assistance for College and Higher Education Programs

ACTION: Notice of deadline dates for receipt of applications, reports, and other records for the 2008–2009 award year.

SUMMARY: The Secretary announces deadline dates for the receipt of documents and other information from institutions and applicants for the Federal student aid programs authorized under Title IV of the Higher Education Act of 1965, as amended, for the 2008–2009 award year. The Federal student aid programs include the Federal Supplemental Educational Opportunity Grant, Federal Family Education Loan, Federal Work-Study, Federal Perkins Loan, Federal Pell Grant, Leveraging Educational Assistance Partnership, William D. Ford Federal Direct Loan, Academic Competitiveness Grant (ACG), National Science and Mathematics Access to Retain Talent Grant (National SMART Grant), and Teacher Education Assistance for College and Higher Education (TEACH) programs.

These programs, administered by the U.S. Department of Education (Department), provide financial assistance to students attending eligible postsecondary educational institutions to help them pay their educational costs.

Deadline and Submission Dates: See Tables A and B at the end of this notice.

Table A—Deadline Dates for Application Processing and Receipt of Student Aid Reports (SARs) or Institutional Student Information Records (ISIRs) by Institutions

Table A provides information and deadline dates for application processing, including receipt of the Free Application for Federal Student Aid (FAFSA) and corrections to and signatures for the FAFSA, receipt of SARs and ISIRs, and receipt of verification documents.

The single date for the receipt of a FAFSA is June 30, 2009, regardless of the method that the applicant uses to submit the FAFSA. The deadline date for the receipt of a signature page for the FAFSA (if required), corrections, changes of addresses or schools, or requests for a duplicate SAR is September 21, 2009. Verification documents must be received by the institution no later than the earlier of 120 days after the student's last date of enrollment or September 28, 2009.

For all Federal student aid programs except Parent PLUS, a SAR or ISIR with an official expected family contribution must be received by the institution no later than the earlier of the student's last date of enrollment or September 28, 2009. For purposes of only the Federal Pell Grant, ACG, or National SMART Grant programs, a valid SAR or valid ISIR for a student not meeting the conditions for a late disbursement must be received no later than the earlier of the student's last date of enrollment or September 28, 2009. A valid SAR or valid ISIR for a student meeting the conditions for a late disbursement under the Federal Pell Grant, ACG, or National SMART Grant programs must be received according to the deadline dates provided in Table A.

In accordance with the regulations in 34 CFR 668.164(g)(4)(i), an institution may not make a late disbursement later than 180 days after the date of the institution's determination that the student withdrew or, for a student who did not withdraw, 180 days after the date the student otherwise became ineligible. Table A provides that an institution must receive a valid SAR or valid ISIR no later than 180 days after its determination of a student's withdrawal or, for a student who did not withdraw, 180 days after the date the student otherwise became ineligible, but not later than September 28, 2009.

Table B—Federal Pell Grant, ACG, and National SMART Grant Programs Submission Dates for Disbursement Information by Institutions

Table B provides the earliest submission and deadline dates for institutions to submit Federal Pell Grant, ACG, and National SMART Grant disbursement records to the Department's Common Origination and Disbursement (COD) System and deadline dates for requests for administrative relief if the institution cannot meet the established deadline for specified reasons.

In general, an institution must submit Federal Pell Grant, ACG, or National

SMART Grant disbursement records no later than 30 days after making a Federal Pell Grant, ACG, or National SMART Grant disbursement or becoming aware of the need to adjust a student's previously reported Federal Pell Grant, ACG, or National SMART Grant disbursement. In accordance with the regulations in 34 CFR 668.164, we consider that Federal Pell Grant, ACG, and National SMART Grant funds are disbursed on the date that the institution: (a) Credits those funds to a student's account in the institution's general ledger or any subledger of the general ledger, or (b) pays those funds to a student directly. We consider that Federal Pell Grant, ACG, and National SMART Grant funds are disbursed even if an institution uses its own funds in advance of receiving program funds from the Department. An institution's failure to submit disbursement records within the required 30-day timeframe may result in an audit or program review finding. In addition, the Secretary may initiate an adverse action, such as a fine or other penalty for such failure.

Other Sources for Detailed Information

We publish a detailed discussion of the Federal student aid application process in the following publications:

- *2008–2009 Funding Education Beyond High School.*
- *2008–2009 Counselors and Mentors Handbook.*
- *2008–2009 ISIR Guide.*
- *2008–2009 Federal Student Aid Handbook.*

Additional information on the institutional reporting requirements for the Federal Pell Grant, ACG, and National SMART Grant programs is contained in the 2008–2009 *COD Technical Reference.* You may access this reference by selecting the ''Publications'' link at the Information for Financial Aid Professionals Web site at: *http://www.ifap.ed.gov.*

Applicable Regulations: The following regulations apply: (1) Student Assistance General Provisions, 34 CFR part 668, (2) Federal Pell Grant Program, 34 CFR part 690, and (3) Academic Competitiveness Grant and National Science and Mathematics Access to Retain Talent Grant Programs, 34 CFR part 691.

FOR FURTHER INFORMATION CONTACT: Harold McCullough, U.S. Department of Education, Federal Student Aid, 830 First Street, NE., Union Center Plaza, Room 113E1, Washington, DC 20202–5345. Telephone: (202) 377–4030.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

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Program Authority: 20 U.S.C. 1070a, 1070a–1, 1070b–1070b–4, 1070c–1070c–4, 1070g, 1071–1087–2, 1087a–1087j, and 1087aa–1087ii; 42 U.S.C. 2751–2756b.

Dated: June 15, 2009.

James F. Manning,

Acting Chief Operating Officer, Federal Student Aid.

BILLING CODE 4000–01–P

Table A. Deadline Dates for Application Processing and Receipt of Student Aid Reports (SARs) or Institutional Student Information Records (ISIRs) by Institutions

Who submits?	What is submitted?	Where is it submitted?	What is the deadline date for receipt?
Student	Free Application for Federal Student Aid (FAFSA) – "FAFSA on the Web" (original or renewal)	Electronically to the Department's Central Processing System (CPS)	June 30, 2009[1]
	Signature Page (if required)	To the address printed on the signature page	September 21, 2009
Student through an Institution	An electronic FAFSA (original or renewal)	Electronically to the Department's CPS	June 30, 2009[1]
Student	A paper original FAFSA	To the address printed on the FAFSA or envelope provided with the form	June 30, 2009
Student	Electronic corrections to FAFSA using "Corrections on the Web"	Electronically to the Department's CPS	September 21, 2009[1]
	Signature Page (if required)	To the address printed on the signature page	September 21, 2009
Student through an Institution	Electronic corrections to FAFSA	Electronically to the Department's CPS	September 21, 2009[1]
Student	Paper corrections to FAFSA using a SAR, including change of mailing and e-mail addresses or institutions	To the address printed on the SAR	September 21, 2009
Student	Change of mailing and e-mail addresses, change of institutions, or requests for a duplicate SAR	To the Federal Student Aid Information Center by calling 1-800-433-3243	September 21, 2009
Student	SAR with an official expected family contribution (EFC) calculated by the Department's CPS (except Parent PLUS)	To the institution	The earlier of: - the student's last date of enrollment; or - September 28, 2009[2]
Student through CPS	ISIR with an official EFC calculated by the Department's CPS (except for Parent PLUS)	To the institution from the Department's CPS	The earlier of: - the student's last date of enrollment; or - September 28, 2009[2]

Student	Valid SAR (Pell, ACG, and National SMART Grant Only)	To the institution	Except for a student meeting the conditions for a late disbursement under 34 CFR 668.164(g), the earlier of: - the student's last date of enrollment; or - September 28, 2009[2] For a student receiving a late disbursement under 34 CFR 668.164(g)(4)(i), the earlier of: - 180 days after the date of the institution's determination that the student withdrew or otherwise became ineligible; or - September 28, 2009[2]
Student through CPS	Valid ISIR (Pell, ACG, and National SMART Grant Only)	To the institution from the Department's CPS	
Student	Verification documents	To the institution	The earlier of:[3] - 120 days after the student's last date of enrollment; or - September 28, 2009[2]

[1] The deadline for electronic transactions is 11:59 p.m. (Central Time) on the deadline date. Transmissions must be completed and accepted before 12:00 midnight to meet the deadline. If transmissions are started before 12:00 midnight but are not completed until after 12:00 midnight, those transmissions do not meet the deadline. In addition, any transmission submitted on or just prior to the deadline date that is rejected may not be reprocessed because the deadline will have passed by the time the user gets the information notifying him/her of the rejection.

[2] The date the ISIR/SAR transaction was processed by CPS is considered to be the date the institution received the ISIR or SAR regardless of whether the institution has downloaded the ISIR from its SAIG mailbox or when the student submits the SAR to the institution.

[3] Although the Secretary has set this deadline date for the submission of verification documents, if corrections are required, deadline dates for submission of paper or electronic corrections and, for a Federal Pell Grant, ACG, and National SMART Grant, the submission of a valid SAR or valid ISIR to the institution must still be met. An institution may establish an earlier deadline for the submission of verification documents for purposes of the campus-based programs, the FFEL Program, and the Federal Direct Loan Program. Students completing verification and submitting a valid SAR or valid ISIR while no longer enrolled will be paid based on the higher of the two EFCs.

Table B. Federal Pell Grant, ACG, and National SMART Grant Programs Submission Dates for Disbursement Information by Institutions			
Who submits?	What is submitted?	Where is it submitted?	What are the earliest disbursement, submission, and deadline dates for receipt?
Institutions	At least one acceptable disbursement record must be submitted for each Federal Pell Grant recipient, ACG recipient, and National SMART Grant recipient at the institution.	To the Common Origination and Disbursement (COD) System using either: - the COD Web site at: www.cod.ed.gov; or - the Student Aid Internet Gateway (SAIG)	Earliest Disbursement Date: January 14, 2008 Earliest Submission Dates: An institution may submit actual or anticipated disbursement information as early as May 19, 2008, but actual disbursement information no earlier than: (a) Under the advance payment method: (1) 30 calendar days prior to the disbursement date of a Federal Pell Grant; or (2) 7 calendar days prior to the disbursement date of an ACG or National SMART Grant; (b) 7 calendar days prior to the disbursement date under the Just-in-Time or Cash Monitoring #1 payment method; or (c) The date of disbursement under the Reimbursement or Cash Monitoring #2 payment methods. Deadline Submission Dates: Except as provided below, an institution is required to submit disbursement information no later than the earlier of: (a) 30 calendar days after the institution makes a disbursement or becomes aware of the need to make an adjustment to previously reported disbursement data; or (b) September 30, 2009.[1] An institution may submit disbursement information after September 30, 2009, only: (a) for a downward adjustment of a previously reported award or disbursement; (b) based upon a program review or initial audit finding per 34 CFR 690.83 or 691.83; (c) for reporting a late disbursement under 34 CFR 668.164(g); or (d) for reporting disbursements previously

			blocked as a result of another institution failing to post a downward adjustment.
Institutions	Request for administrative relief based on a natural disaster or other unusual circumstances, or an administrative error made by the Department	Via COD Web site at: www.cod.ed.gov	The earlier of: - a date designated by the Secretary after consultation with the institution; or - February 1, 2010
Institutions	Request for administrative relief if a student reenters the institution within 180 days after initially withdrawing and the institution is reporting a disbursement for the student within 30 days of the student's reenrollment but after September 30, 2009[2]	Via COD Web site at: www.cod.ed.gov	The earlier of: - 30 days after the student reenrolls; or - May 3, 2010

[1] The deadline for electronic transactions is 11:59 p.m. (Eastern Time) on September 30, 2009. Transmissions must be completed and accepted before 12:00 midnight to meet the deadline. If transmissions are started before 12:00 midnight but are not completed until after 12:00 midnight, those transmissions will not meet the deadline. In addition, any transmission submitted on or just prior to the deadline date that is rejected may not be reprocessed because the deadline will have passed by the time the user gets the information notifying him/her of the rejection.

[2] Applies only to students enrolled in clock-hour and nonterm credit-hour educational programs.

NOTE: The COD System must accept origination data for a student from an institution before it accepts disbursement information from the institution for that student. Institutions may submit origination and disbursement data for a student in the same transmission. However, if the origination data is rejected, the disbursement data is rejected.

[FR Doc. E9–14355 Filed 6–17–09; 8:45 am]
BILLING CODE 4000–01–C

DEPARTMENT OF EDUCATION

Office of Postsecondary Education; Overview Information; Fund for the Improvement of Postsecondary Education (FIPSE)—Special Focus Competition: Graduate Programs at Institutions of Higher Education Serving Hispanic Americans; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2009

Catalog of Federal Domestic Assistance (CFDA) Number: 84.116V.

Dates: Applications Available: June 18, 2009.

Deadline for Transmittal of Applications: August 3, 2009.

Deadline for Intergovernmental Review: October 1, 2009.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Fund for the Improvement of Postsecondary Education (FIPSE) supports innovative grants and cooperative agreements to improve postsecondary education. It supports reforms, innovations, and significant improvements of postsecondary education that respond to problems of national significance and serve as national models. Under the FIPSE Program, the Secretary may make grants for special projects concerning areas of national need.

Priority: Under this competition, we are particularly interested in applications that meet the following invitational priority.

Invitational Priority: For FY 2009 this priority is an invitational priority. Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Under this priority we are particularly interested in projects that propose innovative efforts to expand graduate-level academic offerings at colleges that enroll a significant number of Hispanic American students.

Program Authority: 20 U.S.C. 1138–1138d.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 82, 84, 85, 86, 97, 98, and 99.

Note: The regulations in 34 CFR part 79 apply to all applicants except Federally recognized Indian Tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $10,000,000.

Estimated Range of Awards: $200,000–$300,000 for a two-year project period. $100,000–$150,000 for a one-year project period.

Estimated Average Size of Awards: $250,000 for a two-year project period. $125,000 for a one-year project period.

Maximum Award: We will reject any application that proposes a budget exceeding $300,000 for a two-year project period or $150,000 for a one-year project period. The Assistant Secretary for Postsecondary Education may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 40.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 24 months.

III. Eligibility Information

1. Eligible Applicants

IHEs, other public and private nonprofit institutions and agencies, and combinations of these institutions and agencies.

2. Cost Sharing or Matching

This program does not require cost sharing or matching.

IV. Application and Submission Information

1. Address To Request Application Package

You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *http://e-grants.ed.gov.* To obtain a copy from ED Pubs, write, fax, or call the following: Education Publications Center, P.O. Box 1398, Jessup, MD 20794–1398. Telephone, toll free: 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this program or competition as follows: CFDA number 84.116V.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Accessible Format* in Section VIII of this notice.

2. Content and Form of Application Submission

Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: The application narrative (Part III of the application) is the section in which the applicant addresses most of the selection criteria that reviewers use to evaluate the application. The application narrative must be limited to no more than 20 pages, using the following standards:

- A ''page'' is 8.5″ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, except titles, headings, footnotes, quotations, references, and captions. Charts, tables, figures, and graphs in the application narrative may be single spaced and will count toward the page limit.
- Use a font that is either 12 point or larger, or no smaller than 10 pitch (characters per inch). However, you may use a 10 point font in charts, tables, figures, and graphs.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman and Arial Narrow) will not be accepted.
- The page limit does not apply to Part I, the title page; Part II, the budget summary form (ED Form 524); Part IV, assurances, certifications, and the response to Section 427 of the General Education Provisions Act (GEPA); the table of contents; the project abstract; or the appendix. The appendix may include only the project evaluation chart, summaries of the qualifications of key personnel, letters of support, and references. If you include any attachments or appendices not specifically requested, these items will be counted as part of the program narrative (Part III) for purposes of the page limit requirement.

We will reject your application if you exceed the page limit.

3. Submission Dates and Times

Applications Available: June 18, 2009.

Deadline for Transmittal of Applications: August 3, 2009.

Applications for grants under this program must be submitted electronically using the Electronic Grant

Application System (e-Application) accessible through the Department's e-Grants system. For information (including dates and times) about how to submit your application electronically, or by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 6. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in Section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: October 1, 2009.

4. Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. Funding Restrictions

We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. Other Submission Requirements

Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. Electronic Submission of Applications

Applications for grants under this FIPSE Special Focus Competition—CFDA number 84.116V must be submitted electronically using e-Application, accessible through the Department's e-Grants portal page at: *http://e-grants.ed.gov.*

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

While completing your electronic application, you will be entering data online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

• You must complete the electronic submission of your grant application by 4:30:00 p.m., Washington, DC time, on the application deadline date. E–Application will not accept an application for this program after 4:30:00 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.

• The hours of operation of the e-Grants Web site are 6:00 a.m. Monday until 7:00 p.m. Wednesday; and 6:00 a.m. Thursday until 8:00 p.m. Sunday, Washington, DC time. Please note that, because of maintenance, the system is unavailable between 8:00 p.m. on Sundays and 6:00 a.m. on Mondays, and between 7:00 p.m. on Wednesdays and 6:00 a.m. on Thursdays, Washington, DC time. Any modifications to these hours are posted on the e-Grants Web site.

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password protected file, we will not review that material.

• Your electronic application must comply with any page limit requirements described in this notice.

• Prior to submitting your electronic application, you may wish to print a copy of it for your records.

• After you electronically submit your application, you will receive an automatic acknowledgment that will include a PR/Award number (an identifying number unique to your application).

• Within three working days after submitting your electronic application, fax a signed copy of the SF 424 to the Application Control Center after following these steps:

(1) Print SF 424 from e-Application.

(2) The applicant's Authorizing Representative must sign this form.

(3) Place the PR/Award number in the upper right hand corner of the hard-copy signature page of the SF 424.

(4) Fax the signed SF 424 to the Application Control Center at (202) 245–6272.

• We may request that you provide us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of e-Application Unavailability: If you are prevented from electronically submitting your application on the application deadline date because e-Application is unavailable, we will grant you an extension of one business day to enable you to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) You are a registered user of e-Application and you have initiated an electronic application for this competition; and

(2) (a) E–Application is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) E–Application is unavailable for any period of time between 3:30 p.m. and 4:30:00 p.m., Washington, DC time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgment of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (*see* VII. Agency Contact) or (2) the e-Grants help desk at 1–888–336–8930. If e-Application is unavailable due to technical problems with the system and, therefore, the application deadline is extended, an e-mail will be sent to all registered users who have initiated an e-Application. Extensions referred to in this section apply only to the unavailability of e-Application.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through e-Application because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to e-Application;

and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Levenia Ishmell, Fund for the Improvement of Postsecondary Education, U.S. Department of Education, 1990 K Street, NW., room 6147, Washington, DC 20006–8544. FAX: (202) 502–7877.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. Submission of Paper Applications by Mail

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.116V), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. Submission of Paper Applications by Hand Delivery

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.116V), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this grant notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this program are from 34 CFR 75.210 and are listed in the application package.

VI. Award Administration Information

1. Award Notices

If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. Administrative and National Policy Requirements

We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. Reporting

At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary in 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms.html.*

4. Performance Measures

Under the Government Performance and Results Act of 1993, the following measures will be used by the Department in assessing the performance of this program:

(1) The percentage of funded grantees reporting project dissemination to others; and

(2) The percentage of funded projects reporting institutionalization on their home campuses.

If funded, you will be asked to collect and report data on these measures in your project's annual performance report (34 CFR 75.590). Applicants are also advised to consider these two measures in conceptualizing the design, implementation, and evaluation of the proposed project because of their importance in the application review process. Collection of data on these measures should be a part of the project evaluation plan, along with measures of progress on goals and objectives that are specific to your project.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Levenia Ishmell, Fund for the Improvement of Postsecondary Education, U.S. Department of

Education, 1990 K Street, NW., room 6147, Washington, DC 20006–8544. Telephone: (202) 502–7500 or by e-mail: *Levenia.Ishmell@ed.gov.* The agency contact person does not mail application materials and does not accept applications.

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in Section VII of this notice.

Electronic Access to this Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Delegation of Authority: The Secretary of Education has delegated authority to Daniel T. Madzelan, Director, Forecasting and Policy Analysis for the Office of Postsecondary Education to perform the functions of the Assistant Secretary for Postsecondary Education

Dated: June 15, 2009.

Daniel T. Madzelan,

Director, Forecasting and Policy Analysis.

[FR Doc. E9–14349 Filed 6–17–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Postsecondary Education; Overview Information; Fund for the Improvement of Postsecondary Education (FIPSE)—Special Focus Competition: College Course Materials Rental Initiative; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2009

Catalog of Federal Domestic Assistance (CFDA) Number: 84.116Y.

Dates:

Applications Available: June 18, 2009.

Deadline for Transmittal of Applications: August 3, 2009.

Deadline for Intergovernmental Review: October 1, 2009.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Fund for the Improvement of Postsecondary Education (FIPSE) supports innovative grants and cooperative agreements to improve postsecondary education. It supports reforms, innovations, and significant improvements of postsecondary education that respond to problems of national significance and serve as national models. Under the FIPSE Program, the Secretary may make grants for special projects concerning areas of national need.

Priority: Under this competition, we are particularly interested in applications that meet the following invitational priority.

Invitational Priority: For FY 2009 this priority is an invitational priority. Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Under this priority we are particularly interested in projects that propose innovative efforts to increase opportunities for students to rent college course materials.

Program Authority: 20 U.S.C. 1138–1138d.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 82, 84, 85, 86, 97, 98, and 99.

Note: The regulations in 34 CFR part 79 apply to all applicants except Federally recognized Indian Tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $10,000,000.

Estimated Range of Awards: $200,000–$300,000 for a two-year project period. $100,000–$150,000 for a one-year project period.

Estimated Average Size of Awards: $250,000 for a two-year project period. $125,000 for a one-year project period.

Maximum Award: We will reject any application that proposes a budget exceeding $300,000 for a two-year project period or $150,000 for a one-year project period. The Assistant Secretary for Postsecondary Education may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 40.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 24 months.

III. Eligibility Information

1. Eligible Applicants

IHEs, other public and private nonprofit institutions and agencies, and combinations of these institutions and agencies.

2. Cost Sharing or Matching

This program does not require cost sharing or matching.

IV. Application and Submission Information

1. Address To Request Application Package

You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *http://e-grants.ed.gov.* To obtain a copy from ED Pubs, write, fax, or call the following: Education Publications Center, P.O. Box 1398, Jessup, MD 20794–1398. Telephone, toll free: 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this program or competition as follows: CFDA number 84.116Y.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Accessible Format* in Section VIII of this notice.

2. Content and Form of Application Submission

Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: The application narrative (Part III of the application) is the section in which the applicant addresses most of the selection criteria that reviewers use to evaluate the application. The application narrative must be limited to

no more than 20 pages, using the following standards:

• A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.

• Double space (no more than three lines per vertical inch) all text in the application narrative, except titles, headings, footnotes, quotations, references, and captions. Charts, tables, figures, and graphs in the application narrative may be single spaced and will count toward the page limit.

• Use a font that is either 12 point or larger, or no smaller than 10 pitch (characters per inch). However, you may use a 10 point font in charts, tables, figures, and graphs.

• Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman and Arial Narrow) will not be accepted.

• The page limit does not apply to Part I, the title page; Part II, the budget summary form (ED Form 524); Part IV, assurances, certifications, and the response to Section 427 of the General Education Provisions Act (GEPA); the table of contents; the project abstract; or the appendix. The appendix may include only the project evaluation chart, summaries of the qualifications of key personnel, letters of support, and references. If you include any attachments or appendices not specifically requested, these items will be counted as part of the program narrative (Part III) for purposes of the page limit requirement.

We will reject your application if you exceed the page limit.

3. Submission Dates and Times

Applications Available: June 18, 2009.

Deadline for Transmittal of Applications: August 3, 2009.

Applications for grants under this program must be submitted electronically using the Electronic Grant Application System (e-Application) accessible through the Department's e-Grants system. For information (including dates and times) about how to submit your application electronically, or by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV.6. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in Section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: October 1, 2009.

4. Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. Funding Restrictions

We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. Other Submission Requirements

Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. Electronic Submission of Applications

Applications for grants under this FIPSE Special Focus Competition—CFDA number 84.116Y must be submitted electronically using e-Application, accessible through the Department's e-Grants portal page at: *http://e-grants.ed.gov.*

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

While completing your electronic application, you will be entering data online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

• You must complete the electronic submission of your grant application by 4:30:00 p.m., Washington, DC time, on the application deadline date. E–Application will not accept an application for this program after 4:30:00 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.

• The hours of operation of the e-Grants Web site are 6:00 a.m. Monday until 7:00 p.m. Wednesday; and 6:00 a.m. Thursday until 8:00 p.m. Sunday, Washington, DC time. Please note that, because of maintenance, the system is unavailable between 8:00 p.m. on Sundays and 6:00 a.m. on Mondays, and between 7:00 p.m. on Wednesdays and 6:00 a.m. on Thursdays, Washington, DC time. Any modifications to these hours are posted on the e-Grants Web site.

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password protected file, we will not review that material.

• Your electronic application must comply with any page limit requirements described in this notice.

• Prior to submitting your electronic application, you may wish to print a copy of it for your records.

• After you electronically submit your application, you will receive an automatic acknowledgment that will include a PR/Award number (an identifying number unique to your application).

• Within three working days after submitting your electronic application, fax a signed copy of the SF 424 to the Application Control Center after following these steps:

(1) Print SF 424 from e-Application.

(2) The applicant's Authorizing Representative must sign this form.

(3) Place the PR/Award number in the upper right hand corner of the hard-copy signature page of the SF 424.

(4) Fax the signed SF 424 to the Application Control Center at (202) 245–6272.

• We may request that you provide us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of e-Application Unavailability: If you are prevented from electronically submitting your application on the application deadline date because e-Application is unavailable, we will grant you an extension of one business day to enable you to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) You are a registered user of e-Application and you have initiated an electronic application for this competition; and

(2)(a) E–Application is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) E–Application is unavailable for any period of time between 3:30 p.m. and 4:30:00 p.m., Washington, DC time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgment of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (*see* VII. Agency Contact) or (2) the e-Grants help desk at 1–888–336–8930. If e-Application is unavailable due to technical problems with the system and, therefore, the application deadline is extended, an e-mail will be sent to all registered users who have initiated an e-Application. Extensions referred to in this section apply only to the unavailability of e-Application.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through e-Application because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to e-Application; and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Levenia Ishmell, Fund for the Improvement of Postsecondary Education, U.S. Department of Education, 1990 K Street, NW., Room 6147, Washington, DC 20006–8544. FAX: (202) 502–7877.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. Submission of Paper Applications by Mail

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.116Y), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. Submission of Paper Applications by Hand Delivery

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.116Y), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this grant notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this program are from 34 CFR 75.210 and are listed in the application package.

VI. Award Administration Information

1. Award Notices

If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. Administrative and National Policy Requirements

We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved

application as part of your binding commitments under the grant.

3. Reporting

At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary in 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms.html.*

4. Performance Measures

Under the Government Performance and Results Act of 1993, the following measures will be used by the Department in assessing the performance of this program:

(1) The percentage of funded grantees reporting project dissemination to others; and

(2) The percentage of funded projects reporting institutionalization on their home campuses.

If funded, you will be asked to collect and report data on these measures in your project's annual performance report (34 CFR 75.590). Applicants are also advised to consider these two measures in conceptualizing the design, implementation, and evaluation of the proposed project because of their importance in the application review process. Collection of data on these measures should be a part of the project evaluation plan, along with measures of progress on goals and objectives that are specific to your project.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Levenia Ishmell, Fund for the Improvement of Postsecondary Education, U.S. Department of Education, 1990 K Street, NW., Room 6147, Washington, DC 20006–8544. Telephone: (202) 502–7500 or by e-mail: *Levenia.Ishmell@ed.gov.* The agency contact person does not mail application materials and does not accept applications.

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in Section VII of this notice.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Delegation of Authority: The Secretary of Education has delegated authority to Daniel T. Madzelan, Director, Forecasting and Policy Analysis for the Office of Postsecondary Education to perform the functions of the Assistant Secretary for Postsecondary Education.

Dated: June 15, 2009.

Daniel T. Madzelan,

Director, Forecasting and Policy Analysis.

[FR Doc. E9–14354 Filed 6–17–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13436–000]

Hydrodynamics, Inc.; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

June 11, 2009.

On April 27, 2009, Hydrodynamics, Inc. filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Quake Lake Hydroelectric Project, which would be located at Quake Lake on the Madison River, in Madison and Gallatin Counties, Montana. The project would be located on U.S. Forest Service and private lands. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following:

(1) An existing 1,380-foot-long, 210-foot-high landslide-formed earthen dam; (2) an existing reservoir having a surface area of 636 acres and a storage capacity of approximately 50,000 acre-feet at the normal water surface elevation of 6,395 feet mean sea level; (3) a new 30-foot by 30-foot, 50-foot-high submerged concrete intake; (4) a new 9-foot-diameter, 3,200-foot-long penstock; (5) a new powerhouse containing two generating units with a combined installed capacity of 5.05 megawatts; (6) a new tailrace discharging flows into the Madison River; (7) a new substation; (8) a new 12.5-kilovolt, 4-mile-long transmission line; and (9) appurtenant facilities. The proposed project would have an average annual generation of 40 gigawatt-hours.

Applicant Contact: Ben Singer, Project Manager, Hydrodynamics, Inc., P.O. Box 1136, Bozeman, MT 59771; phone: (406) 587–5086.

FERC Contact: Dianne Rodman, (202) 502–6077.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13436) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–14290 Filed 6–17–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13351–000]

Marseilles Land and Water Company; Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

June 11, 2009.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Major license.

b. *Project No.:* P–13351–000.

c. *Date filed:* December 30, 2008.

d. *Applicant:* Marseilles Land and Water Company.

e. *Name of Project:* Marseilles Lock and Dam Project.

f. *Location:* On the Illinois River, in the town of Marseilles, La Salle County, Illinois. This project would not occupy any Federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Lee W. Mueller, Architect and Vice President, Marseilles Land & Water Company, 4132 S. Rainbow Blvd., #247, Las Vegas, NV 89103, (702) 367–7302.

i. *FERC Contact:* Steve Kartalia, *Stephen.Kartalia@ferc.gov*, (202) 502–6131.

j. *Deadline for filing motions to intervene and protests:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedures require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Motions to intervene and protests may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the ''efiling'' link. For a simpler method of submitting text only comments, click on ''Quick Comment.''

k. This application has been accepted for filing, but is not ready for environmental analysis at this time.

l. *Project Description:* The Marseilles Lock and Dam Project would utilize the head created by the existing 24-foot-high Army Corps of Engineers (Corps) Marseilles Lock and Dam and two existing Corps headgate structures and would consist of: (1) The existing north and south headraces in which a portion of the south headrace would be filled in and joined to the existing north headrace which would be deepened to accommodate the flow from both headraces leading to; (2) a new intake structure and forebay leading to; (3) a new powerhouse containing four generating units with a total installed capacity of 10.26 megawatts (MW); (4) a new tailrace discharging water back to the Illinois River; (5) a new 400-foot-long underground transmission line; and (6) appurtenant facilities.

The project would operate in a run-of-river mode.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Competing development applications, notices of intent to file such an application, and applications for preliminary permits will not be accepted in response to this notice.

Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

All filings must (1) bear in all capital letters the title ''PROTEST'' or ''MOTION TO INTERVENE;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–14291 Filed 6–17–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–430–000]

Stingray Pipeline Company, LLC; Notice of Application

June 11, 2009.

Take notice that on June 9, 2009, Stingray Pipeline Company, LLC (Stingray), 1100 Louisiana, Suite 3300, Houston, Texas 77002, filed an application in Docket No. CP09–430–000, pursuant to section 7(c)(1)(B) of the Natural Gas Act and Rule 207(a)(5) of the Commission's regulations, requesting permission and approval to deactivate, on a temporary basis, a compressor unit located at its Station 702 in the Federal waters offshore Louisiana within West Cameron Block 509. Specifically, Stingray proposes to deactivate this mainline compressor unit for a period of up to 18 months. During this time, Stingray states that it will decide whether Gulf of Mexico gas production and development justifies the replacement of this unit pursuant to section 2.55(b) of the Commission's regulations or whether it is appropriate to apply for permanent abandonment, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Any questions regarding this application should be directed to Chris Kaitson, Assistant Secretary Manager, at (713) 821–2028, *Chris.Kaitson@enbridge.com* or Cynthia Hornstein Roney, Regulatory Affairs, at (832) 214–9334, *Cynthia.roney@enbridge.com*, Stingray Pipeline Company, LLC, 1100 Louisiana, Suite 3300, Houston, Texas 77002.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and State agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all Federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: July 2, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–14292 Filed 6–17–09; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collections Approved by Office of Management and Budget

June 10, 2009.

SUMMARY: The Federal Communications Commission (FCC) has received Office of Management and Budget (OMB) approval for the following public information collections pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

FOR FURTHER INFORMATION CONTACT: Dana Wilson, Federal Communications Commission, 445 12th Street, SW., Washington, DC, 20554, (202) 418–2247 or via the Internet at *Dana.Wilson@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0463.

OMB Approval Date: 07/20/2008.

Expiration Date: 07/31/2011.

Title: Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order and Declaratory Ruling, CG Docket No. 03–123, FCC 07–186.

Form No.: N/A.

Estimated Annual Burden: 5,211 responses; 10 to 15 hours per response; 27,412 total annual hourly burden; $0 total annual cost.

Needs and Uses: On November 19, 2007, the Commission released the *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* Report and Order and Declaratory Ruling (*2007 TRS Cost Recovery Order*), CG Docket No. 03–123, FCC 07–186, adopting (1) A new cost recovery methodology for interstate traditional Telecommunications Relay Services (TRS) and interstate Speech-to-Speech (STS) based on the Multi-state Average Rate Structure (MARS) plan proposed by Hamilton Relay, Inc., (2) a new cost recovery methodology for interstate captioned telephone service (CTS) and interstate and intrastate Internet-Protocol (IP) Captioned Telephone Service (IP CTS) based on the MARS plan, (3) a cost recovery methodology for IP Relay based on price caps, and (4) a cost recovery methodology for Video Relay Services (VRS) that adopts tiered rates based on call volume. The *2007 TRS Cost Recovery Order* also clarifies the nature and extent that certain categories of

costs are compensable from the Interstate TRS Fund (Fund), and addresses certain issues concerning the management and oversight of the Fund, including financial incentives offered to consumers to make relay calls and the role of the Interstate TRS Fund Advisory Council.

The *2007 TRS Cost Recovery Order* establishes reporting requirements associated with the MARS plan cost recovery methodology for compensation from the Fund. Specifically, TRS providers must submit to the Fund administrator the following information annually, on a per-state basis, regarding the previous calendar year: (1) The per-minute compensation rate(s) for intrastate traditional TRS, STS and CTS, (2) whether the rate applies to session minutes or conversation minutes, (3) the number of intrastate session minutes for traditional TRS, STS and CTS, and (4) the number of intrastate conversation minutes for traditional TRS, STS, and CTS. Also, STS providers must file a report annually with the Fund administrator and the Commission on their specific outreach efforts directly attributable to the additional compensation approved by the Commission for STS outreach.

In the *2007 TRS Cost Recovery Order,* the Commission has assessed the effects of imposing the submission of rate data, and has found that there is no increased administrative burden on businesses with fewer than 25 employees. The Commission recognizes that the required rate data is presently available with the states and the providers of interstate traditional TRS, interstate STS, and interstate CTS, thereby no additional step is required to produce such data. The Commission therefore believes that the submission of the rate data does not increase an administrative burden on businesses.

OMB Control No.: 3060–0519.

OMB Approval Date: 10/31/2008.

Expiration Date: 10/31/2011.

Title: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02–278.

Form No.: N/A.

Estimated Annual Burden: 135,607,383 responses; .004 hours (15 seconds) to 1 hour per response; 625,406 total annual hourly burden; $4,590,000 total annual cost.

Needs and Uses: The reporting requirements included under this OMB Control Number 3060–0519 enable the Commission to gather information regarding violations of the Do-Not-Call Implementation Act (Do-Not-Call Act). If the information collection was not conducted, the Commission would be unable to track and enforce violations of the Do-Not-Call Act. The Do-Not-Call rules provide consumers with several options for avoiding most unwanted telephone solicitations.

This national do-not-call registry supplements the current company-specific do-not-call rules for those consumers who wish to continue requesting that particular companies not call them. Any company, which is asked by a consumer, including an existing customer, not to call again must honor that request for five (5) years.

However, a provision of the Commission's rules allows consumers to give specific companies permission to call them through an express written agreement. Nonprofit organizations, companies with whom consumers have an established business relationship, and calls to persons with whom the telemarketer has a personal relationship are exempt from the ''do-not-call'' registry requirements.

On September 21, 2004, the Commission released the *Safe Harbor Order* establishing a limited safe harbor in which persons will not be liable for placing autodialed and prerecorded message calls to numbers ported from a wireline service within the previous 15 days. The Commission also amended its existing national do-not-call registry safe harbor to require telemarketers to scrub their lists against the do-not-call database every 31 days.

On December 4, 2007, the Commission released the *DNC NPRM* seeking comment on its tentative conclusion that registrations with the Registry should be honored indefinitely, unless a number is disconnected or reassigned or the consumer cancels his registration.

On June 17, 2008, the Commission released a *Report and Order* in CG Docket No. 02–278, FCC 08–147, amending the Commission's rules under the Telephone Consumer Protection Act (TCPA) to require sellers and/or telemarketers to honor registrations with the National Do-Not-Call Registry so that registrations will not automatically expire based on the current five year registration period. Specifically, the Commission modifies 64.1200(c)(2) of its rules to require sellers and/or telemarketers to honor numbers registered on the Registry indefinitely or until the number is removed by the database administrator or the registration is cancelled by the consumer. In accordance with the Do-Not-Call Improvement Act of 2007, the Commission revises its rules to minimize the inconvenience to consumers of having to re-register their preferences not to receive telemarketing calls and to further the underlying goal of the National Do-Not-Call Registry to protect consumer privacy rights.

OMB Control No.: 3060–0687.

OMB Approval Date: 06/05/2009.

Expiration Date: 06/30/2012.

Title: Access to Telecommunications Equipment and Services by Persons with Disabilities, CC Docket No. 87–124.

Form No.: N/A.

Estimated Annual Burden: 22,500,000 responses; 1 second (0.000278 hours) to 15 seconds (0.004167 hours) per response; 6,693 total annual hourly burden; $266,280 total annual cost.

Needs and Uses: 47 CFR 68.224—Notice of non-hearing aid compatibility. Every non-hearing aid compatible telephone offered for sale to the public on or after August 17, 1989, whether previously-registered, newly registered or refurbished shall (a) contain in a conspicuous location on the surface of its packaging a statement that the telephone is not hearing aid compatible, or if offered for sale without a surrounding package, shall be affixed with a written statement that the telephone is not hearing aid compatible; and (b) be accompanied by instructions in accordance with 47 CFR 62.218(b)(2).

47 CFR 68.300—Labeling requirements. As of April 1, 1997, all registered telephones, including cordless telephones, manufactured in the United States (other than for export) or imported for use in the United States, that are hearing aid compatible shall have the letters ''HAC'' permanently affixed.

The information collections for both rules contain third party disclosure and labeling requirements. The information is used primarily to inform consumers who purchase and/or use telephone equipment whether the telephone is hearing aid compatible.

OMB Control No.: 3060–0717.

OMB Approval Date: 06/16/2008.

Expiration Date: 06/30/2011.

Title: Billed Party Preference for InterLATA 0+ Calls, CC Docket No. 92–77, 47 CFR 64.703(a), 64.709, 64.710.

Form No.: N/A.

Estimated Annual Burden: 11,250,150 responses; 60 seconds to 50 hours per response; 197,362 total annual hourly burden; $116,250 total annual cost.

Needs and Uses: Pursuant to 47 CFR 64.703(a), Operator Service Providers (OSPs) are required to disclose, audibly and distinctly to the consumer, at no charge and before connecting any interstate call, how to obtain rate quotations, including any applicable surcharges. 47 CFR 64.710 imposes similar requirements on OSPs to

inmates at correctional institutions. 47 CFR 64.709 codifies the requirements for OSPs to file informational tariffs with the Commission. These rules help to ensure that consumers receive information necessary to determine what the charges associated with an OSP-assisted call will be, thereby enhancing informed consumer choice in the operator services marketplace.

OMB Control No.: 3060–0737.

OMB Approval Date: 03/17/2009.

Expiration Date: 03/31/2012.

Title: Disclosure Requirements for Information Services Provided Under a Presubscription or Comparable Arrangement.

Form No.: N/A.

Estimated Annual Burden: 1,000 responses; 4.5 hours per response; 4,500 total annual hourly burden; $0 total annual cost.

Needs and Uses: Section 64.1501(b) defines a presubscription or comparable arrangement as a contractual agreement in which an information service provider makes specified disclosures to consumers when offering ''presubscribed'' information services. The disclosures are intended to ensure that consumers receive information regarding the terms and conditions associated with these services before they enter into contracts to subscribe to them.

OMB Control No.: 3060–0787.

OMB Approval Date: 07/14/2008.

Expiration Date: 07/31/2011.

Title: Implementation of Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94–129, FCC 07–223.

Form No.: N/A.

Estimated Annual Burden: 25,041 responses; 0.50 to 10 hours per response; 105,901 total annual hourly burden; $51,285,000 total annual cost.

Needs and Uses: Section 258 of the Telecommunications Act of 1996 directed the Commission to prescribe rules to prevent the unauthorized change by telecommunications carriers of consumers' selections of telecommunications service providers (slamming). On March 17, 2003, the FCC released the *Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking,* CC Docket No. 94–129, FCC 03–42 (*Third Order on Reconsideration*), in which the Commission revised and clarified certain rules to implement section 258 of the 1996 Act. On May 23, 2003, the Commission released an *Order* (CC Docket No. 94–129, FCC 03–116) clarifying certain aspects of the *Third Order on Reconsideration.* On January 9, 2008, the Commission released the *Fourth Report and Order,* CC Docket No. 94–129, FCC 07–223, revising its requirements concerning verification of a consumer's intent to switch carriers. The *Fourth Report and Order* modifies the information collection requirements contained in 64.1120(c)(3)(iii) to provide for verifications to elicit ''confirmation that the person on the call understands that a carrier change, not an upgrade to existing service, bill consolidation, or any other misleading description of the transaction, is being authorized.''

OMB Control No.: 3060–0854.

OMB Approval Date: 09/29/2008.

Expiration Date: 09/30/2011.

Title: Truth-in-Billing Format, CC Docket No. 98–170 and CG Docket No. 04–208.

Form No.: N/A.

Estimated Annual Burden: 41,858 responses; 2 to 243 hours per response; 3,872,876 total annual hourly burden; $15,418,200 total annual cost.

Needs and Uses: On March 18, 2005, the Commission released *Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing,* Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, CC Docket No. 98–170, CG Docket No. 04–208, 20 FCC Rcd 6448 (2005) (*2005 Second Report and Order and Second Further Notice*); published at 70 FR 29979 and 70 FR 30044, May 25, 2005, which determined, *inter alia,* that Commercial Mobile Radio Service providers no longer should be exempted from 47 CFR 64.2401(b), which requires billing descriptions to be brief, clear, non-misleading and in plain language. The *2005 Second Further Notice* proposed and sought comment on measures to enhance the ability of consumers to make informed choices among competitive telecommunications service providers.

OMB Control No.: 3060–1047.

OMB Approval Date: 03/04/2009.

Expiration Date: 03/31/2012.

Title: Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and order, FCC 03–112 and FCC 05–203.

Form No.: N/A.

Estimated Annual Burden: 80 responses; 1 to 8 hours per response; 322 total annual hourly burden; $230 total annual cost.

Needs and Uses: On December 12, 2005, the Commission released *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* CG Docket No. 03–123, Report and Order and Order on Reconsideration, 20 FCC Rcd 20577 (2005) (*2005 TRS Report and Order*), published at 70 FR 76208, December 23, 2005, which created another method for some Telecommunications Relay Service (TRS) providers to become eligible to receive compensation from the Interstate TRS Fund (Fund). Specifically, the *2005 TRS Report and Order* amended the TRS regulations to permit a common carrier seeking to offer Video Relay Service (VRS) or Internet Protocol (IP) Relay Service and receive compensation from the Fund to apply to the Commission for certification as an entity providing these services in compliance with the TRS rules, and therefore eligible to receive reimbursement from the Fund. In a subsequent declaratory ruling, the Commission also permitted entities desiring to provide IP captioned telephone service to seek certification from the Commission for eligibility to receive compensation from the Fund. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Internet-based Captioned Telephone Service,* CG Docket No. 03–123, Declaratory Ruling, 22 FCC Rcd 379 (2007), published at 72 FR 6960, February 14, 2007.

In order to facilitate this certification process, the Commission adopted information collection requirements that include the following:

(A) 47 CFR 64.606 (a)(2): Providing documentation detailing: (1) A description of the forms of TRS to be provided, (2) a description of how the provider will meet all non-waived mandatory minimum standards applicable to each form of TRS offered, (3) a description of the provider's procedures for ensuring compliance with all applicable TRS rules, (4) a description of the provider's complaint procedures, (5) a narrative describing any areas in which the provider's service will differ from the applicable mandatory minimum standards, (6) a narrative establishing that services that differ from the mandatory minimum standards do not violate applicable mandatory minimum standards, (7) demonstration of status as a common carrier, and (8) a statement that the provider will file annual compliance reports demonstrating continued compliance with the rules;

(B) 47 CFR 64.606 (c)(2): A provider may apply for renewal of its certification by filing documentation

with the Commission, at least 90 days prior to expiration of certification, containing the information described in 47 CFR 64.606 (a)(2);

(C) 47 CFR 64.606 (e)(2): A provider must submit documentation demonstrating ongoing compliance with the Commission's minimum standards if, for example, the Commission receives evidence that a certified provider may not be in compliance with the minimum standards and the Commission requests such information;

(D) 47 CFR 64.606 (f)(2): Providers certified under this section must notify the Commission of substantive changes in their TRS programs, services, and features within 60 days of when such changes occur, and must certify that the interstate TRS provider continues to meet Federal minimum standards after implementing the substantive change; and

(E) 47 CFR 64.606 (g): Providers certified under this section shall file with the Commission, on an annual basis, a report providing evidence that they are in compliance with 47 CFR 64.604. In *Telecommunication Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Americans with Disabilities Act of 1990,* CG Docket No. 03–123, CC Docket No. 98–67, Second Report and Order, Order on Reconsideration, and Notice of Proposed Rulemaking, 18 FCC Rcd 12379 (2003), published at 68 FR 50993, August 25, 2003, the Commission adopted additional requirements related to the substance and implementation of TRS mandatory minimum standards. In 47 CFR 64.604(a)(3), the Commission required TRS facilities to provide speed dialing functionality, which may entail providers maintaining a list of telephone numbers. In addition, the Commission bolstered the contact information requirements of 47 CFR 64.604(c)(2).

Furthermore, the Commission required providers receiving waivers of some of these standards to submit to the Commission an annual waiver report that details (1) The technological changes with respect to the functionalities covered by the waivers; (2) the progress made; and (3) the steps taken to resolve the technological problems that prevent these providers from offering certain types of TRS calls and features.

OMB Control No.: 3060–1089.

OMB Approval Date: 11/14/2008.

Expiration Date: 11/30/2011.

Title: Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP–Enabled Service Providers, CG Docket No. 03–123 and WC Docket No. 05–196, FCC 08–151.

Form No.: N/A.

Estimated Annual Burden: 1,680,044 responses; 3 minutes (.05 hours) to 1 hour per response; 98,616 total annual hourly burden; $4,224,346 total annual cost.

Needs and Uses: On November 30, 2005, the Commission released *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Access to Emergency Services,* Notice of Proposed Rulemaking (VRS/IP Relay 911 *NPRM*), CG Docket No. 03–123, FCC 05–196, published at 71 FR 5221 (February 1, 2006), which addressed the issue of access to emergency services for Internet-based forms of Telecommunications Relay Services (TRS), namely Video Relay Service (VRS) and Internet Protocol (IP) Relay. The Commission sought to adopt means to ensure that such calls promptly reach the appropriate emergency service provider.

On May 8, 2006, the Commission released *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Misuse of IP Relay Service and Video Relay Service,* Further Notice of Proposed Rulemaking (*IP Relay/VRS Misuse FNPRM*), CG Docket No. 03–123, FCC 06–58, published at 71 FR 31131 (June 1, 2006), which sought further comment on whether IP Relay and VRS providers should be required to implement user registration systems and what information users should provide, as a means of curbing illegitimate IP Relay and VRS calls.

On May 9, 2006, the Commission released *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* Declaratory Ruling and Further Notice of Proposed Rulemaking (*Interoperability Declaratory Ruling and FNPRM*), CG Docket No. 03–123, FCC 06–57, published at 71 FR 30818 and 71 FR 30848 (May 31, 2006). In the *Interoperability Declaratory Ruling and FNPRM,* the Commission sought comment on the feasibility of establishing a single, open, and global database of proxy numbers for VRS users that would be available to all service providers, so that a hearing person can call a VRS user through any VRS provider, and without having first to ascertain the VRS user's current IP address.

On June 24, 2008, the Commission released *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP–Enabled Service Providers,* Report and Order and Further Notice of Proposed Rulemaking (*Report and Order*), CG Docket No. 03–123 and WC Docket No. 05–196, FCC 08–151, addressing the issues raised in these notices. The *Report and Order* provides VRS and IP Relay users with a reliable and consistent means by which others (including emergency personnel) can identify or reach them by, among other things, integrating VRS and IP Relay users into the ten-digit, NANP numbering system.

First, to complete a telephone call to an Internet-based TRS user, a provider must have some method of logically associating the telephone number dialed by the caller to the Internet-based TRS user's device. That method, known as the TRS Numbering Directory, is a central database that maps each user's telephone number to routing information needed to find that user's device on the Internet. The *Report and Order* requires VRS and IP Relay providers to collect and maintain the routing information from their registered users and to provision that information to the TRS Numbering Directory so that this mapping can occur.

Second, because there is no reliable means for VRS and IP Relay providers, unlike wireline carriers, to automatically know the physical location of their users, the *Report and Order* requires VRS and IP Relay providers to collect and maintain the Registered Location of their registered users. And to ensure that authorities can retrieve a user's Registered Location (along with the provider's name and CA's identification number for callback purposes), the *Report and Order* requires VRS and IP Relay providers to provision that information into, or make that information available through, ALI databases across the country.

Third, to ensure that VRS and IP Relay users are aware of their providers' numbering and E911 service obligations and to inform those users of their providers' E911 capabilities, the *Report and Order* requires each VRS and IP Relay provider to post an advisory on its Web site, and in any promotional materials directed to consumers, addressing numbering and E911 services for VRS or IP Relay. Providers also must obtain and keep a record of affirmative acknowledgement from each of their registered users of having received and understood the user notification.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–14321 Filed 6–17–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Approved by the Office of Management and Budget

June 15, 2009.

SUMMARY: The Federal Communications Commission has received Office of Management and Budget (OMB) approval for the following public information collection(s) pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number, and no person is required to respond to a collection of information unless it displays a currently valid OMB control number. Comments concerning the accuracy of the burden estimate(s) and any suggestions for reducing the burden should be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

FOR FURTHER INFORMATION CONTACT: Leslie Haney, *Leslie.Haney@fcc.gov,* (202) 418–1002.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1085.

OMB Approval Date: June 9, 2009.

Expiration Date: June 30, 2012.

Title: Section 9.5, Interconnected Voice Over Internet Protocol (VoIP) E911 Compliance.

Form No.: Not applicable.

Estimated Annual Burden: 14,320,000 responses; 24.90 hours per response (average); 574,945 hours total annual burden hours; and $80,235,305 in annual cost.

Obligation to Respond: Mandatory. Statutory authority for this information collection is contained in 47 U.S.C. 151, 152(a), 153(33), 153(52), and 251(e)(3).

Nature and Extent of Confidentiality: The Commission is not requesting that respondents submit confidential information to the Commission.

Needs and Uses: The Commission requesting an extension (no change in recordkeeping and/or third party disclosure requirements) in order to obtain the full three year clearance from the OMB. There has been a significant decrease in recalculating the number of respondents/responses since this was last submitted to OMB in 2006. The Commission has also increased the total annual burden hours and annual costs due to a recalculation of the estimates.

The Commission is obligated by statute to promote ''safety of life and property'' and to ''encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure'' for public safety. Congress has established 911 as the national emergency number to enable all citizens to reach emergency services directly and efficiently, irrespective of whether a citizen uses wireline or wireless technology when calling for help by dialing 911. Efforts by Federal, State and local government, along with the significant efforts of wireline and wireless service providers, have resulted in the nearly ubiquitous deployment of this life-saving service.

The *Order* the Commission adopted on May 19, 2005, sets forth rules requiring providers of VoIP services that interconnect with the nation's existing public switched telephone network (interconnected VoIP services) to supply E911 capabilities to their customers. To ensure E911 functionality for customers of VoIP service providers the Commission requires the following information collections:

A. *Location Registration.* Requires providers to interconnected VoIP services to obtain location information from their customers for use in the routing of 911 calls and the provision of location information to emergency answering points.

B. *Provision of Automatic Location Information (ALI).* Interconnected VoIP service providers will place the location information for their customers into, or make that information available through, specialized databases maintained by local exchange carriers (and, in at least one case, a state government) across the country.

C. *Customer Notification.* Requires that all providers of interconnected VoIP are aware of their interconnected VoIP service's actual E911 capabilities. That all providers of interconnected VoIP service specifically advise every subscriber, both new and existing, prominently and in plain language, the circumstances under which E911 service may not be available through the interconnected VoIP service or may be in some way limited by comparison to traditional E911 service.

D. *Record of Customer Notification.* Requires VoIP providers to obtain and keep a record of affirmative acknowledgement by every subscriber, both new and existing, of having received and understood this advisory.

E. *User Notification.* In addition, in order to ensure to the extent possible that the advisory is available to all potential users of an interconnected VoIP service, interconnected VoIP service providers must distribute to all subscribers, both new and existing, warning stickers or other appropriate labels warning subscribers if E911 service may be limited or not available and instructing the subscriber to place them on or near the customer premises equipment used in conjunction with the interconnected VoIP service.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–14322 Filed 6–17–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than July 6, 2009

A. Federal Reserve Bank of San Francisco ((Tracy Basinger, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105-1579:

1. Donald and Donna Nelson, to retain 10.9 percent of State Bank Corp., and indirectly its subsidiary, Mohave State Bank, both of Lake Havasu City, Arizona

Board of Governors of the Federal Reserve System, June 15, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–14309 Filed 6–17–09; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institute for Occupational Safety and Health

Decision To Evaluate a Petition To Designate a Class of Employees for the Lake Ontario Ordnance Works, Niagara Falls, New York, To Be Included in the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HHS gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees for the Lake Ontario Ordnance Works, Niagara Falls, New York, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

Facility: Lake Ontario Ordnance Works.

Location: Niagara Falls, New York.

Job Titles and/or Job Duties: All employees of the Department of Energy, its predecessor agencies, and their contractors and subcontractors.

Period of Employment: January 1, 1944 through December 31, 1953.

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV.*

Christine M. Branche,

Acting Director, National Institute for Occupational Safety and Health.

[FR Doc. E9–14306 Filed 6–17–09; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Information Technology Policy Committee; Notice of Meeting

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice and request for comments.

Authority: Section 3002, Public Law 111–5, 123 Stat. 115.

SUMMARY: This notice invites comments, within ten (10) days of the June 16, 2009, HIT Policy Committee (the ''Committee'') meeting, on the Committee's discussions of and draft recommendations for the term ''meaningful use'' available at *http://healthit.hhs.gov.* Comments will be received by the Committee for consideration and further recommendations to the National Coordinator of Health Information Technology on the elements and measures of Meaningful Use of a certified EHR.

The HIT Policy Committee is a Federal Advisory Committee (FACA) to the U.S. Department of Health and Human Services (HHS), which will be meeting on June 16, 2009, to explore further the term ''meaningful use'' of electronic health records (EHRs). Announcement of this meeting was published in the **Federal Register** on June 4 (74 FR 26866). This meeting is an important next step for the Department, as it investigates possible definitions for the term meaningful use.

The American Recovery and Reinvestment Act of 2009 (the ''Recovery Act'') (Pub. L. 111–5) provides for Medicare and Medicaid incentive payments for eligible providers, such as physicians and hospitals, in order to promote the adoption of EHRs. To receive the incentive payments, providers must demonstrate ''meaningful use'' of a certified EHR. Building upon the work of the HIT Policy Committee, HHS anticipates developing a proposed rule that provides greater detail on the incentive programs and ''meaningful use.'' HHS expects to issue the proposed rule in late 2009, which will be followed by a comment period.

The HIT Policy Committee's Meaningful Use Workgroup will present its recommendations to the HIT Policy Committee at the Committee's June 16, 2009 meeting. The Workgroup's presentation will reflect diverse ideas and contributions from the workgroup members, and build upon the National Committee on Vital and Health Statistics (NCVHS) public hearing on ''meaningful use'' convened in April 2009. The NCVHS hearing brought together key healthcare and information technology stakeholder groups.

DATES: All comments on the draft description of Meaningful Use should be received no later than 5 p.m./Eastern Time on June 26, 2009.

ADDRESSES: Electronic responses to the request for comments on the draft description of Meaningful Use are preferred and should be addressed to: *MeaningfulUse@hhs.gov,* subject line ''Meaningful Use.'' Written comments may also be submitted to the Office of the National Coordinator for Health Information Technology, 200 Independence Ave, SW., Suite 729D, Washington, DC 20201. Attention: HIT Policy Committee Meaningful Use Comments.

FOR FURTHER INFORMATION CONTACT: Cut and paste the link below in your browser. *http://healthit.hhs.gov/portal/server.pt?open=512&objID=1269&parentname=CommunityPage&parentid=8&mode=2&in_hi_userid=10741&cached=true.*

For additional information, including any requests for a hard copy (or faxed copy) of the draft description of Meaningful Use, call or e-mail Judith Sparrow, 202–205–4528, *judy.sparrow@hhs.gov.*

SUPPLEMENTARY INFORMATION: The HIT Policy Committee requests comments on the draft description of Meaningful Use by June 26, 2009. We request that comments be no more than 2,000 words in length. Please send comments to the address, for receipt by the due date, specified above.

Dated: June 15, 2009.

Judith Sparrow,

Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. E9–14379 Filed 6–16–09; 11:15 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration on Aging

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Extension of the Expiration Date of the Title VI Program Performance Report

AGENCY: Administration on Aging, HHS.

ACTION: Notice.

SUMMARY: The Administration on Aging (AoA) is announcing that the proposed collection of information listed below has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments on the collection of information by July 20, 2009.

ADDRESSES: Submit written comments on the collection of information by fax 202.395.6974 to the OMB Desk Officer for AoA, Office of Information and Regulatory Affairs, OMB.

FOR FURTHER INFORMATION CONTACT: Yvonne Jackson; Director; Office for American Indian, Alaskan Native and Native Hawaiian Programs; Administration on Aging; Washington, DC, 20201; (202) 357–3501; *Yvonne.Jackson@aoa.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, AoA has submitted the following proposed collection of information to OMB for review and clearance. AoA is requesting a continuation of an existing collection for Annual Program Performance Reports for Older Americans Act Title VI grantees. Information from the Title VI Program Performance Report provides a data base for AoA to (1) monitor program achievement of performance objectives; (2) establish program policy and direction; and (3) prepare responses to Congress, the OMB, the U.S. Government Accountability Office, other federal departments, and public and private agencies as required by the OAA Title II sections 202(a)19 and 208; and (4) prepare data for the Federal Interagency Task Force on Older Indians established pursuant to section 134(d) of the 1987 Amendments to the OAA. If AoA did not collect the program data herein requested, it would not be able to monitor and manage total program progress as expected, nor develop program policy options directed toward assuring the most effective use of limited Title VI funds. Reports are due annually on June 30th. AoA submits an annual report to Congress and the reporting data is included in that report. Estimated Number of Responses: 246. Total Estimated Burden Hours: 615.

In the **Federal Register** of April 8, 2009 (Vol. 74, No. 66, Pages 15984–15985), the agency requested comments on the proposed collection of information. No comments were received.

Dated: June 12, 2009.

Edwin L. Walker,

Acting Assistant Secretary for Aging.

[FR Doc. E9–14348 Filed 6–17–09; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–09–0595]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. Alternatively, to obtain a copy of the data collection plans and instrument, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Reports Clearance Officer, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30333; comments may also be sent by e-mail to *omb@cdc.gov*.

Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarify of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

The Model Performance Evaluation Program for HIV Rapid Testing (MPEP HIV–RT) (OMB Control No. 0920–0595, expiration date 3/31/2010)—Revision—National Center for Preparedness, Detection, and Control of Infectious Diseases (NCPDCID), Centers for Disease Control and Prevention (CDC).

Brief Description and Background

To support CDC's mission of improving public health and preventing disease through continuously improving laboratory practices, CDC is requesting approval from the Office of Management and Budget (OMB) to continue data collection activities of the HIV rapid testing performance evaluation program (MPEP HIV RT) and to make changes to the results form.

This program offers external performance evaluation (PE) twice a year for rapid HIV tests approved by the U.S. Food and Drug Administration (FDA). Examples of such tests are the OraQuick ADVANCE Rapid HIV–½ Antibody Test, the Uni-Gold Recombigen HIV test, the Clearview HIV ½ STAT–PAK, the Clearview COMPLETE HIV ½, and the MedMira Reveal G3 Rapid HIV–1 Antibody Test. Participation in PE programs is expected to lead to improved HIV testing performance because participants have the opportunity to identify areas for improvement in their testing practices. This program helps to ensure accurate HIV rapid testing which is the foundation for HIV prevention and intervention programs.

This program offers laboratories/testing sites opportunities for:

(1) Assuring that the laboratories/testing sites are providing accurate test results through external quality assessment

(2) Improving testing quality through self-evaluation in a non-regulatory environment

(3) Testing well characterized samples from a source outside the test kit manufacturer

(4) Discovering potential testing problems so that laboratories/testing sites can adjust procedures to reduce and eliminate errors

(5) Comparing individual laboratory/testing site results to others at the national and international level, and

(6) Consulting with CDC staff to discuss testing issues.

Program participants receive PE samples twice each year and report testing results to CDC. In addition to conducting the performance evaluation, participants in the MPEP HIV Rapid Testing program are required to complete a biennial (every other year) laboratory practices questionnaire. The burden for the Laboratory Practices Questionnaire has been adjusted for the average per year, since respondents complete the survey every two years. CDC does not charge any fees to sites participating in this external quality assessment program.

There is no cost to respondents to participate in this program.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Labs	660	2	10/60	220
Labs	330	1	30/60	165
Total				385

Dated: June 11, 2009.

Maryam I. Daneshvar,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E9–14312 Filed 6–17–09; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day-09–0600]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. Alternatively, to obtain a copy of the data collection plans and instrument, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Reports Clearance Officer, 1600 Clifton Road, NE., MS–D74, Atlanta, Georgia 30333; comments may also be sent by e-mail to *omb@cdc.gov*.

Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have a practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarify of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Model Performance Evaluation Program for *Mycobacterium tuberculosis* and Non-tuberculous Mycobacterium Drug Susceptibility Testing (OMB Control No. 0920–0600, expiration date 03/31/2010)—Revision—National Center for Preparedness, Detection, and Control of Infectious Diseases (NCPDCID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

As part of the continuing effort to support both domestic and global public health objectives for treatment of tuberculosis (TB), prevention of multi-drug resistance, and surveillance programs, CDC is requesting approval from the Office of Management and Budget to continue data collection from participants in the Model Performance Evaluation Program for *Mycobacterium tuberculosis* and Non-tuberculous Mycobacterium Drug Susceptibility Testing. This request includes changes to the Results Form and re-introduction of the Laboratory Practices Questionnaire.

While the overall number of cases of TB in the U.S. has decreased, rates still remain high among foreign-born persons, prisoners, homeless populations, and individuals infected with HIV in major metropolitan areas. The rate of TB cases detected in foreign-born persons has been reported to be more than nine times higher than the rate among the U.S. born population. CDC's goal to eliminate TB will be virtually impossible without considerable effort in assisting heavy disease burden countries in the reduction of tuberculosis. The Model Performance Evaluation Program for *Mycobacterium tuberculosis* and Non-tuberculous Mycobacterium Drug Susceptibility Testing program supports this role by monitoring and evaluating the level of performance and practices among national and international laboratories performing *M. tuberculosis* susceptibility testing. Participation in this program is one way laboratories can ensure high-quality laboratory testing, resulting in accurate and reliable testing results.

By providing an evaluation program to assess the ability of the laboratories to test for drug resistant *M. tuberculosis* and selected strains of Non-tuberculous *Mycobacteria* (NTM), laboratories also have a self-assessment tool to aid in optimizing their skills in susceptibility testing. The information obtained from laboratories on susceptibility testing practices and procedures is used to establish variables related to good performance, assessing training needs, and aid with the development of practice standards.

Participants in this program include domestic clinical and public health laboratories and international laboratories. Data collection from domestic laboratory participants occurs twice per year. Data collection from international laboratories is limited to those that have public health responsibilities for tuberculosis drug susceptibility testing and have obtained approval to participate by their national tuberculosis program. The data collected in this program will include the susceptibility test results of primary and secondary drugs, drug concentrations, and test methods performed by laboratories on a set of performance evaluation (PE) samples. The PE samples are sent to participants twice a year. Participants also report demographic data such as laboratory type and the number of tests performed annually. Participants report this data every two years. The burden for the Laboratory Practices Questionnaire has been adjusted for the average per year, since responses are received every other year.

There is no cost to respondents to participate other than their time.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Form	Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Susceptibility Testing Results Form	Labs	262	2	30/60	262
Laboratory Practices Questionnaire	Labs	132	1	30/60	66
Total					328

Dated: June 11, 2009.

Maryam I. Daneshvar,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E9–14313 Filed 6–17–09; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Delegation of Authority

Notice is hereby given that I have delegated to the Administrator, Substance Abuse and Mental Health Services Administration (SAMHSA), with authority to redelegate, the authorities vested in the Secretary of Health and Human Services under section 3990 of the Public Health Service Act (42 U.S.C. 280g–3), as amended hereafter, insofar as these authorities pertain to the functions assigned to SAMHSA.

These authorities shall be exercised under the Department's Policy on regulations and the existing delegation of authority to approve and issue regulations.

In addition, I have affirmed and ratified any actions taken by the SAMHSA Administrator or by any other SAMHSA officials, which, in effect, involved the exercise of this authority prior to the effective date of this delegation.

This delegation is effective upon date of signature.

Dated: June 5, 2009.

Kathleen Sebelius,

Secretary.

[FR Doc. E9–14219 Filed 6–17–09; 8:45 am]

BILLING CODE 4160–01–M

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2009–0086]

Science and Technology (S&T) Directorate; Submission for Review; Information Collection Request for the DHS S&T SAFETY Act Program

AGENCY: Science and Technology Directorate, DHS.

ACTION: 60-day Notice and request for comment.

SUMMARY: The Department of Homeland Security (DHS) invites the general public to comment on the following data collection forms for the DHS Science and Technology Directorate's Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act Program: Registration of a Seller of an Anti-Terrorism Technology (DHS Form 10010), Request for a Pre-Application Consultation (DHS Form 10009), Notice of License of Qualified Anti-Terrorism Technology (DHS Form 10003), Application for Modification of SAFETY Act Benefits (DHS Form 10002), Request for Transfer of SAFETY Act Benefits (DHS Form 10001), Application for SAFETY Act Renewal, Application for SAFETY Act Developmental Testing and Evaluation (DT&E) Designation (DHS Form 10006), Application for SAFETY Act Designation (DHS Form 10008), Application for SAFETY Act Certification (DHS Form 10007), Application for SAFETY Act Block Designation (DHS Form 10005), and Application for SAFETY Act Block Certification (DHS Form 10004).

In 2002, The Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act (6 CFR Part 25) was enacted as part of the Homeland Security Act of 2002, Public Law 107–296. The SAFETY Act program promotes the development and use of anti-terrorism technologies that will enhance the protection of the nation and provides risk management and litigation management protections for sellers of Qualified Anti-Terrorism Technology (QATT) and others in the supply and distribution chain.

The Department of Homeland Security Science & Technology Directorate (DHS S&T) currently has approval to collect information for the implementation of the SAFETY Act program until January 31, 2010. With this notice, DHS S&T seeks approval to renew this information collection for continued use after this date. The SAFETY Act program requires the collection of this information in order to evaluate and qualify Anti-Terrorism Technologies, based on the economic and technical criteria contained in the SAFETY Act Final Rule, for protection in accordance with the Act, and therefore encourage the development and deployment of new and innovative anti-terrorism products and services.

This notice and request for comments is required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

DATES: Comments are encouraged and will be accepted until August 17, 2009.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to Desk Officer for the Department of Homeland Security, Science & Technology Directorate, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974. Please include the docket number [DHS–2009–0086] in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Michael Bowerbank, 202–254–6895.

SUPPLEMENTARY INFORMATION: DHS S&T provides a secure website, accessible through *http://www.SAFETYAct.gov*, through which the public can learn about the program, submit applications for SAFETY Act protections, submit questions to the Office of SAFETY Act Implementation (OSAI), and provide feedback. The data collection forms have standardized the collection of information that is both necessary and essential for the DHS OSAI.

Overview of Information Collection

(1) *Type of Information Collection:* Existing information collection.

(2) *Title of the Form/Collection:* SAFETY Act Program.

(3) *Agency Form Number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* DHS Science & Technology Directorate, DHS Forms 10001, 10002, 10003, 10004, 10005, 10006, 10007, 10008, 10009, 10010.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Business entities, Associations, and State, Local and Tribal Government entities. Applications are reviewed for benefits, technology/program evaluations, and regulatory compliance.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

a. *Estimate of the total number of respondents:* 950.

b. *An estimate of the time for an average respondent to respond:* 18.2 burden hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 17,300 burden hours.

Dated: June 10, 2009.

Kenneth D. Rogers,

Chief Information Officer, Science and Technology Directorate, Department of Homeland Security.

[FR Doc. E9–14277 Filed 6–17–09; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Secret Service

60-Day Notice of Proposed Information Collection

SUMMARY: The U.S. Department of Homeland Security, Office of the Chief Information Officer, invites comments on the proposed information collection request as required by the Paperwork Reduction Act of 1995. Currently, the U.S. Secret Service, within the U.S. Department of Homeland Security is soliciting comments concerning the SSF 86A, Supplemental Investigative Data.

DATES: Interested persons are invited to submit comments on or before August 17, 2009.

ADDRESSES: Direct all written comments to United States Secret Service, Security Clearance Division, Attn: Althea Washington, Personnel Security Branch, 950 H St., NW., Washington, DC 20223, Suite 3800, 202–406–6658. Individuals who use a telecommunications device for the deaf (TDD) may either call the Federal Information Relay Service (FIRS) at 1–800–877–8339 or call directly (TTY) 202–406–5390.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to: United States Secret Service, Security Clearance Division, Attn: Robin DeProspero, Security Clearance Division, 950 H Street, NW., Washington, DC 20223. Telephone number: 202–406–6658.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires each Federal agency to provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The notice for this proposed information collection contains the following: (1) The name of the component of the U.S. Department of Homeland Security; (2) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (3) OMB Control Number, if applicable; (4) Title; (5) Summary of the collection; (6) Description of the need for, and proposed use of, the information; (7) Respondents and frequency of collection; and (8) Reporting and/or Recordkeeping burden. The Department of Homeland Security invites public comment.

The Department of Homeland Security is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department, including whether the information will have practical utility; (2) Is the estimate of burden for this information collection accurate; (3) How might the Department enhance the quality, utility, and clarity of the information to be collected; and (4) How might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Abstract: Respondents are all Secret Service applicants. These applicants, if approved for hire, will require a Top Secret Clearance, and possible SCI Access. Responses to questions on the SSF 86A yields information necessary for the adjudication for eligibility of the clearance, as well as ensuring that the applicant meets all internal agency requirements.

Agency: United States Secret Service.

Title: Supplemental Investigative Data.

OMB Control Number: 1620–0001.

Form Number: SSF 86A.

Frequency: Occasionally.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals.

Reporting and Recordkeeping Hour Burden:

Responses: 10,000.

Burden Hours: 30,000.

Dated: June 15, 2009.

Sharon Johnson,

Chief—Policy Analysis and Organizational Development Branch U.S. Secret Service, U.S. Department of Homeland Security.

[FR Doc. E9–14310 Filed 6–17–09; 8:45 am]

BILLING CODE 4810–42–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1840–DR; Docket ID FEMA–2008–0018]

Florida; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Florida (FEMA–1840–DR), dated May 27, 2009, and related determinations.

DATES: *Effective Date:* June 4, 2009.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Florida is hereby amended to include Public Assistance and the Hazard Mitigation Grant Program in the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of May 27, 2009.

Baker, Clay, Flagler, and Putnam Counties for Public Assistance.

Volusia County for Public Assistance (already designated for Individual Assistance).

All counties within the State of Florida are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to

Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. E9–14270 Filed 6–17–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF THE INTERIOR

National Park Service

30–Day Notice of Intention To Request Clearance of Collection of Information; Opportunity for Public Comment

AGENCY: National Park Service, Interior.

ACTION: Notice and request for comments.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 and 5 CFR Part 1320, Reporting and Record-keeping Requirements, the National Park Service (NPS) invites public comments on an extension of a currently approved collection of information (OMB #1024–0144).

DATES: Public comments on this Information Collection Request (ICR) will be accepted on or before July 20, 2009.

ADDRESSES: You may submit comments directly to the Desk Officer for the Department of the Interior (OMB #1024–0144), Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), by fax at 202/395–5806, or by electronic mail at *oira_docket@omb.eop.gov.* Please also mail or hand carry a copy of your comments to Sherry Hutt, Manager, National NAGPRA Program, National Park Service, 1201 Eye Street NW., Washington, DC 20005 or via fax at 202/371–5197.

FOR FURTHER INFORMATION CONTACT: Sherry Hutt, Manager, National NAGPRA Program, National Park Service, 1201 Eye St. NW., Washington, DC 20005, or via fax at 202/371–5197. You are entitled to a copy of the entire Information Collection Request (ICR) package free-of-charge. You may access this ICR at *http://www.reginfo.gov/public/.*

Comments Received on the 60–Day Federal Register Notice

The NPS published a 60-day notice to solicit public comments on this ICR in the **Federal Register** on March 9, 2009 (74 FR 10066). The comment period closed on May 8, 2009. No comments were received on this notice.

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 1024–0144.

Title: Native American Graves Protection and Repatriation Regulations 43 CFR 10.

Form(s): None.

Type of request: Extension of a currently approved collection of information.

Description of need: The Native American Graves Protection and Repatriation Act (NAGPRA) requires museums to compile certain information (summaries, inventories, and notices) regarding Native American cultural items in their possession or control and provide that information to lineal descendants, culturally affiliated Indian tribes and Native Hawaiian organizations, and the National Park Service (acting on behalf of the Secretary of the Interior).

Affected public: Museums defined in NAGPRA as any institution that receives Federal funds and has possession of or control over Native American cultural items.

Obligation to respond: It is mandatory to comply with the requirements of the law.

Frequency of response: Information collection requirements are done on an as-needed basis, with summaries due within six months of either receipt of a new collection or acknowledgment of a new Indian tribe, and inventories due within two years of either receipt of a new collection or acknowledgment of a new Indian tribe. An institution receiving Federal funds for the first time must provide a summary within three years and an inventory within five years.

Estimated total annual responses: 150 total responses (Responses for summaries or inventories at 46, notices at 104).

Estimated average completion time per response: Public reporting burden for this collection of information is expected to average 100 hours for the exchange of summary/inventory information between a museum or Federal agency and an Indian tribe or Native Hawaiian organization and six hours per response for the notification to the Secretary, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collected information.

Estimated annual reporting burden: 5,224 hours.

Comments are invited on: (1) The practical utility of the information being gathered; (2) the accuracy of the burden hour estimate; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden to respondents, including use of automated information collection techniques or other forms of information technology. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that OMB will be able to do so.

Dated: June 15, 2009.

Cartina Miller,

NPS Information Collection Clearance Officer.

[FR Doc. E9–14319 Filed 6–17–09; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: Horner Collection, Oregon State University, Corvallis, OR

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of the Horner Collection, Oregon State University, Corvallis, OR, that meet the definition of ''sacred objects'' under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

The three cultural items are two cradle baskets and one basket cap.

The Museum of Oregon Country, Oregon Agricultural College was

renamed the John B. Horner Museum of the Oregon Country in 1936, and became commonly known as the Horner Museum. The Oregon Agricultural College was renamed the Oregon State College in 1937, and became Oregon State University in 1962. The Horner Museum closed in 1995. Currently, cultural items from the Horner Museum are referred to as the Horner Collection.

The Horner Collection, Oregon State University professional staff consulted with representatives of the Confederated Tribes of the Siletz Reservation, Oregon; Cow Creek Band of Umpqua Indians of Oregon; Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada; Hoopa Valley Tribe, California; Karuk Tribe of California; Pit River Tribe, California (includes XL Ranch, Big Bend, Likely, Lookout, Montgomery Creek and Roaring Creek Rancherias); Smith River Rancheria, California; and Yurok Tribe of the Yurok Reservation, California. The Big Lagoon Rancheria, California; Blue Lake Rancheria, California; Cher-Ae Heights Indian Community of the Trinidad Rancheria, California; Quartz Valley Indian Community of the Quartz Valley Reservation of California; and Resighini Rancheria, California, were notified about the cultural items described in this notice, but did not participate in the consultations.

On June 8, 1973, the C.B. Kennedy Family and Mrs. Ruth Kennedy Tartar through Dr. N.L. Tartar (executor of estate) donated a collection of Oregon and coastal California Indian basketry to the Horner Collection. Among the collection are a cradle basket and basket cap. Museum records indicate that Mr. C.B. Kennedy, Mrs. Kennedy, and their daughter, Ruth, were avid collectors of Native American artifacts, including projectile points, pottery, photographs, bows and arrows, beadwork, and carvings, in addition to Indian basketry. Museum records also include a typewritten account of the ''Story of Ella Ben,'' a Rogue River Indian residing on the Siletz Reservation. This story indicates that a friendly relationship existed between Ella Ben and the Kennedy family. Ella Ben was known to sell basketry that she had made in Newport, OR, and the story indicates that Mrs. Kennedy purchased several items from her between 1911 and 1916.

Newport, OR, is located within the Siletz Reservation Indians' traditional territory. According to the *Report of the Commissioner of Indian Affairs, Accompanying The Annual Report of the Secretary of the Interior For the Year 1857*, the Confederated Tribes of the Rogue River and Shasta Indians were removed to the coastal Siletz Reservation, under the immediate charge of Agent Robert B. Metcalfe. The Siletz Indian Agency, in a report dated July 15, 1857, noted that the tribes of Indians which are located in the Siletz district include the Shasta or Upper Rogue River Indians.

Consultants from the Siletz Reservation have viewed the basket cap and have attributed the materials used and the style of the basket to be that of Siletz weavers from the Northwest coast. Siletz consultants identified the basket cap as a cap that would be used in ceremonial dancing, and the ceremonies continue to take place. In fact, the basket cap in question has been loaned previously to members of the Siletz Reservation for use in ceremonies and dancing. Based on museum records and consultation with Siletz tribal representatives, the Horner Collection, Oregon State University reasonably believes that the basket cap is a sacred item that is culturally affiliated with the Confederated Tribes of the Siletz Reservation, Oregon.

According to Siletz tribal representatives, the cradle basket appears too small to be a *Gaayu* intended for actual use, but instead, was made as a special wedding gift and as a sacred item meant to bind families together through marriage. Such cradle baskets are considered sacred objects, as they embody a prayer for offspring for the couple who will be bringing forth the next generation. Traditionally, cradle baskets are personal property and people hold onto the basket for their entire lives. Tribal representatives from the Siletz Reservation have attributed the cradle basket materials and the style of the basket to be that of Siletz weavers from the Northwest coast. They also indicate that these cradle baskets are a symbol of making medicine and blessing future family offspring and relationships. Based on geographic, historic documents, museum and donor history, and consultation with Siletz consultants, the Horner Collection, Oregon State University reasonably believes the cradle basket is a sacred item that is culturally affiliated with the Confederated Tribes of the Siletz Reservation, Oregon.

At an unknown date, by an unknown person, a cradle basket was removed from an unknown location. There are no museum records for this item. Consultants from the Siletz Reservation have viewed this cradle basket and have attributed the materials used and the style of the basket to be that of Siletz weavers from the Northwest coast. The cradle basket is almost identical in shape and design to the previously described cradle basket. Based on the similarity of style and design, it is reasonably believed that the cradle basket is most likely also a sacred object and culturally affiliated with the Confederated Tribes of the Siletz Reservation, Oregon.

Officials of the Horner Collection, Oregon State University have determined that, pursuant to 25 U.S.C. 3001 (3)(C), the three cultural items described above are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. Officials of the Horner Collection, Oregon State University also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the sacred objects and the Confederated Tribes of the Siletz Reservation, Oregon.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the sacred objects should contact Sabah Randhawa, Executive Vice President and Provost, President's Office, Oregon State University, 600 Kerr Administration Building, Corvallis, OR 97331, telephone (541) 737–8260, before [*insert date 30 days following publication in the* **Federal Register**]. Repatriation of the sacred objects to the Confederated Tribes of the Siletz Reservation, Oregon may proceed after that date if no additional claimants come forward.

The Horner Collection, Oregon State University is responsible for notifying the Big Lagoon Rancheria, California; Blue Lake Rancheria, California; Cher-Ae Heights Indian Community of the Trinidad Rancheria, California; Confederated Tribes of the Siletz Reservation, Oregon; Cow Creek Band of Umpqua Indians of Oregon; Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada; Hoopa Valley Tribe, California; Karuk Tribe of California; Pit River Tribe, California; Quartz Valley Indian Community of the Quartz Valley Reservation of California; Resighini Rancheria, California; Smith River Rancheria, California; and Yurok Tribe of the Yurok Reservation, California that this notice has been published.

Dated: May 18, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–14297 Filed 6–17–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of Defense, U.S. Army Corps of Engineers, Sacramento District, Sacramento, CA; U.S. Department of the Interior, National Park Service, Sequoia & Kings Canyon National Parks, Three Rivers, CA; and Phoebe A. Hearst Museum of Anthropology, University of California, Berkeley, Berkeley, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the control of the U.S. Department of Defense, Army Corps of Engineers, Sacramento District, Sacramento, CA, and in the physical custody of the Phoebe A. Hearst Museum of Anthropology, University of California, Berkeley, Berkeley, CA, and the U.S. Department of the Interior, National Park Service, Sequoia & Kings Canyon National Parks, Three Rivers, CA. The human remains and associated funerary objects were removed from within the boundaries of Lake Kaweah, Tulare County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

An assessment of the human remains in the physical custody of the Phoebe A. Hearst Museum of Anthropology was made by the museum's professional staff. Sequoia & Kings Canyon National Parks also did an assessment of the human remains and associated funerary objects in their physical custody. The assessment of the cultural affiliation for the U.S. Army Corps of Engineers, Sacramento District was based on a Corps of Engineers contracted study done in 2004, titled ''Cultural Affiliation of the Lake Kaweah Property, U.S. Army Corps of Engineers, Sacramento District.'' These assessments were made based on the results of an extensive study utilizing the four fields of anthropology. Copies of the report were sent to representatives of the Big Sandy Rancheria of Mono Indians of California; Cold Springs Rancheria of Mono Indians of California; Northfork Rancheria of Mono Indians of California; Picayune Rancheria of Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; and Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California. Consultation was also carried out by Sequoia & Kings Canyon National Parks' professional staff with the following non-Federally recognized Indian groups, which represent traditionally associated peoples who have maintained interest in previous repatriation and reburial efforts for the area: Dunlap Band of Mono Indians, Sierra Foothill Wuksachi Tribe, Sierra Nevada Native American Coalition, and Wukchumni Tribal Council.

Between 1959 and 1961, human remains were removed from CA–TUL–145 (''Cobble Lodge''), Tulare County, CA. In 1959, the human remains were removed during an excavation of a borrow pit in support of the construction of Terminus Dam and the creation of the reservoir that forms Lake Kaweah, a Federal project undertaken and still managed by the U.S. Army Corps of Engineers. Between 1960 and 1961, human remains were removed during salvage work being carried out by Dr. Jay von Werlhof, under contracts coordinated by the National Park Service at the request of the Army Corps. The report by Dr. von Werlhof (1961) identified 130 individuals and 502 artifacts. An unidentified number of fragmentary and skeletal remains were re-interred at the site following the field work. Human remains were transferred to the museum at the University of California, Berkeley. Additionally, human remains and associated funerary objects were deposited at the Ash Mountain Headquarters of Sequoia & Kings Canyon National Parks. One brownware pottery vessel had been transferred to the University of New Mexico (Maxwell Museum), and is now in the physical custody of the Sequoia & Kings Canyon National Parks. The human remains in the physical custody of the University of California, Berkeley and Sequoia & Kings Canyon National Parks represent a minimum of five individuals. No known individuals were identified. The 120 associated funerary objects are 16 projectile points, 25 bifaces and fragments, 5 modified flaked stones, 18 flaked stones/debitage, 16 ground stone artifacts, 16 steatite artifacts, 1 brownware pottery sherd, 1 brownware vessel, 6 faunal remains, and 16 marine shell ornaments.

The Cobble Lodge materials in the possession of Sequoia & Kings Canyon National Parks have been re-examined by URS, Inc. (Browning and Nilsson 2007). The artifact assemblage includes chipped stone projectile points (Desert Series, Cottonwood, Rose Spring, and Sierra Concave Base), steatite vessels and beads, marine shell ornaments, and the single brownware vessel. These temporally diagnostic artifacts support an interpretation that the site is a multiple component site that would have been occupied circa 300 B.C. to A.D. 1850. The report by von Werlhof (1961) interpreted Cobble Lodge to be a late Prehistoric housepit village and cemetery, and to have been permanently occupied until the early 1860s. This suite of artifact types is most strongly affiliated in the archeological record with the Yokuts and Western Mono (Monache) cultural groups.

Geographic and linguistic evidence also places Yokuts and Western Mono (Monache) groups within the western foothills of the southern Sierra Nevada during this time period. Descendants of the Yokuts and Western Mono (Monache) are members of the Big Sandy Rancheria of Mono Indians of California; Cold Springs Rancheria of Mono Indians of California; Northfork Rancheria of Mono Indians of California; Picayune Rancheria of Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; and Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California.

Officials of the Army Corps of Engineers, Sacramento District and Sequoia & Kings Canyon National Parks have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of five individuals of Native American ancestry. Officials of the Army Corps of Engineers, Sacramento District and Sequoia & Kings Canyon National Parks also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 120 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Army Corps of Engineers, Sacramento District have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human

remains and associated funerary objects and the Big Sandy Rancheria of Mono Indians of California; Cold Springs Rancheria of Mono Indians of California; Northfork Rancheria of Mono Indians of California; Picayune Rancheria of Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; and Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Richard Perry, NAGPRA Point of Contact, USACE Army Corps of Engineers, 1325 J St., Sacramento, CA 95814, telephone (916) 557–5218, before July 20, 2009. Repatriation of the human remains and associated funerary objects to the Big Sandy Rancheria of Mono Indians of California; Cold Springs Rancheria of Mono Indians of California; Northfork Rancheria of Mono Indians of California; Picayune Rancheria of Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; and Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California may proceed after that date if no additional claimants come forward.

Officials of the Army Corps of Engineers, Sacramento District are responsible for notifying the Big Sandy Rancheria of Mono Indians of California; Cold Springs Rancheria of Mono Indians of California; Northfork Rancheria of Mono Indians of California; Picayune Rancheria of Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; and Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California that this notice has been published.

Dated: May 18, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–14296 Filed 6–17–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Binghamton University, State University of New York, Binghamton, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of associated funerary objects in the possession and control of Binghamton University, State University of New York, Binghamton, NY. The associated funerary objects were removed from the Engelbert site, Tioga County, NY.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the associated funerary objects was made by Binghamton University professional staff in consultation with representatives of the Cayuga Nation of New York; Delaware Tribe (part of the Cherokee Nation, Oklahoma); Delaware Nation, Oklahoma; Oneida Tribe of Indians of Wisconsin; Oneida Nation of New York; Onondaga Nation of New York; Saint Regis Mohawk Tribe, New York (formerly the St. Regis Mohawk Band of Mohawk Indians of New York); Seneca Nation of New York; Seneca-Cayuga Tribe of Oklahoma; Stockbridge Munsee Community, Wisconsin; Tonawanda Band of Seneca Indians of New York; and Tuscarora Nation of New York.

In 1967 and 1968, human remains representing a minimum of 188 individuals and associated funerary objects were removed from the Engelbert site in Tioga County, NY, during gravel mining for construction of the Southern Tier Expressway (NY 17). Initial assessment of the site was done in 1967 by Dr. Robert E. Funk of the New York State Museum, Albany, NY. In 1967, Dr. Marian E. White, assisted by students from the State University of New York (SUNY) at Buffalo, conducted trench excavations in a portion of the site. In 1967 and 1968, the primary archeological excavations and recovery were directed by Dr. William D. Lipe of SUNY-Binghamton over two field seasons, with the assistance of members of the Triple Cities Chapter of the New York State Archeological Association, students from SUNY-Binghamton, and local volunteers. In 1967, the human remains and associated funerary objects were placed under the control of the Triple Cities Chapter of the New York State Archeological Association, and then transferred to the State University of New York at Binghamton in 1968. In 1989, the human remains were transferred to the New York State Museum for curation. No known individuals were identified. The associated funerary objects are in the physical possession and control of Binghamton University. The 2,640 associated funerary objects are 804 pieces of lithic debitage; 438 lots of fragmented pottery; 319 roughstone tools; 136 chipped stone bifaces and tools; 104 lots of animal bone and shell; 88 bone beads; 51 copper ornaments; 47 pieces of fire-cracked rock; 18 fragments of pipes; 18 groundstone tools; 4 bone points; 2 shell beads; 1 bone comb; and 610 geologic/organic samples.

Archeological evidence shows that the Engelbert site is a large, multicomponent habitation site on a gravel knoll bordering the Susquehanna River in New York. The knoll was used intermittently over a period of about 5,000 years, as suggested by diagnostic artifacts from the Late Archaic (Lamoka, Dustin, and Snook Kill points), Transitional (Susquehanna Broad points), Late Woodland (triangular points, pottery), Proto-historic and Historic (beads, copper ornaments, and pottery) periods. The site was also used as a burial site during at least two different periods, from about A.D. 1000 to the 1400s, and again during the late 1500s and possibly into the early 1600s. The later burials are few in number. Archeologists have concluded that artifacts associated with the earlier burials, including pottery (e.g., Carpenter Brook, Levanna, Sackett, Kelso, Castle Creek, and Oak Hill) and projectile points (triangular Levannas/Madisons), are similar to other sites across a broad geographic region that later became associated with both Iroquoian- and Algonquian-speaking peoples, some of whom became members of the Haudenosaunee Confederacy, a non-Federally recognized Indian group for the purposes of NAGPRA. The Haudenosaunee Confederacy includes the Federally-recognized six Nations of the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora.

The later burials at the site contained pottery types (e.g., Schultz Incised, Monongahela, shell-tempered) and copper ornaments (e.g., spirals) that usually are associated with Susquehannock peoples who lived in the Susquehanna River Valley in New York and Pennsylvania. Archeological data indicate that Susquehannock material culture and lifeways were broadly similar to other Iroquoian- and Algonquian- speaking peoples, including the Haudenosaunee, Erie, Petun, Huron, and Delaware among others. Archeological and historical evidence shows that, towards the end of the 16th century, the Susquehannock moved south along the Susquehanna River to escape warfare and position their villages closer to trade with the southern colonies. Throughout the 17th century, the Susquehannock were greatly reduced by disease and warfare. Historical records show that by A.D. 1763, the Susquehannock were so diminished by these processes that they ceased to exist as a separate group. Individuals and groups were adopted and assimilated into various Indian Nations. Some survivors moved northward to live among the Haudenosaunee, while other Susquehannocks lived among their Delaware allies. As a result, no Federally-recognized Susquehannock groups exist today for the purposes of NAGPRA. Haudenosaunee oral tradition describes a relationship of shared group identity with the Susquehannock peoples, such as those interred at the Engelbert site, based on the adoption of many Susquehannock into Nations within the Haudenosaunee Confederacy. The Onondaga Nation asserts a relationship of shared group identity with the peoples interred at the Engelbert site based on oral history, geography, linguistics, material culture, and kinship.

The Onondaga Nation petitioned the Native American Graves Protection and Repatriation Committee (Review Committee) to hear a dispute with the New York State Museum about the cultural affiliation of the human remains removed from the Engelbert site. The Engelbert funerary objects in the physical possession and control of Binghamton University are directly associated with the human remains removed from the Engelbert site, but were not part of this hearing. During their October 11–12, 2008 meeting in San Diego, CA, and in their Findings and Recommendations published in the **Federal Register** (74 FR 9427–9428, March 4, 2009), the Review Committee found a relationship of shared group identity between the human remains from the Engelbert site and the Onondaga Nation and Haudenosaunee Confederacy. The Onondaga Nation and the New York State Museum consulted with members of the Confederacy, as well as the Stockbridge-Munsee and Delaware Nation, and found support for repatriation of the Engelbert human remains to the Onondaga Nation, as documented in written support from the Federally-recognized Tonawanda Seneca Indians of New York and Tuscarora Nation of New York; verbal support from the Federally-recognized Oneida Nation of New York; St. Regis Mohawk Tribe, New York; Seneca Nation of New York; Cayuga Nation of New York, and Oneida Tribe of Indians of Wisconsin; and written support from the Delaware Tribe of Indians (part of the Federally-recognized Cherokee Nation, Oklahoma) and the Federally-recognized Stockbridge-Munsee Community, Wisconsin. Based on this information, Binghamton University also supports the repatriation of the associated funerary objects from the Engelbert site to the Onondaga Nation within whose traditional territory the associated funerary objects were found.

Officials of Binghamton University have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 2,640 lots and objects described above are reasonably believed to have been placed with or near individual Native American human remains at the time of death or later as part of the death rite or ceremony. Officials of Binghamton University have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the associated funerary objects and the Haudenosaunee Confederacy, a non-Federally-recognized Indian group for the purposes of NAGPRA. Based on the written and verbal support of Haudenosaunee and Delaware Nations, officials of Binghamton University also have determined that the associated funerary objects should be repatriated to the Onondaga Nation of New York within whose traditional territory the associated funerary objects were found.

Representatives of any other Indian Nation or tribe that believes itself to be culturally affiliated with the associated funerary objects should contact Nina M. Versaggi, Public Archaeology Facility, Binghamton University, Binghamton, NY 13902–6000, telephone (607) 777–4786, before July 20, 2009. Repatriation of the associated funerary objects to the Onondaga Nation of New York may proceed after that date if no additional claimants come forward.

Binghamton University is responsible for notifying the Cayuga Nation of New York; Delaware Tribe (part of the Cherokee Nation, Oklahoma); Delaware Nation, Oklahoma; Oneida Tribe of Indians of Wisconsin; Oneida Nation of New York; Onondaga Nation of New York; Saint Regis Mohawk Tribe, New York; Seneca Nation of New York; Seneca-Cayuga Tribe of Oklahoma; Stockbridge Munsee Community, Wisconsin; Tonawanda Band of Seneca Indians of New York; and Tuscarora Nation of New York that this notice has been published.

Dated: May 18, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–14298 Filed 6–17–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–FHC–2009–N0092; 71490–1351–0000–M2–FY09]

Marine Mammal Protection Act; Stock Assessment Report

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of draft revised marine mammal stock assessment reports for the Pacific walrus stock and two stocks of polar bears; request for comments.

SUMMARY: In accordance with the Marine Mammal Protection Act of 1972, as amended (MMPA), and its implementing regulations, we, the U.S. Fish and Wildlife Service (Service), have developed draft revised marine mammal stock assessment reports (SARs) for the Pacific walrus (*Odobenus rosmarus divergens*) stock and for each of the two polar bear (*Ursus maritimus*) stocks in Alaska: The southern Beaufort Sea polar bear stock and the Chukchi/Bering seas polar bear stock. These three SARs are available for public review and comment.

DATES: We must receive comments by September 16, 2009.

ADDRESSES: To obtain the SARs for the Pacific walrus or either polar bear stock, and to submit comments, see Document Availability and Public Comment, respectively, under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Rosa Meehan, Marine Mammals Management Office, (800) 362–5148 (telephone) or *r7_mmm_comment@fws.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Background

Under the MMPA (16 U.S.C. 1361 *et seq.*) and its implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR part 18, we regulate the taking, possession, transportation, purchasing, selling, offering for sale, exporting, and importing of marine mammals. One of the MMPA's goals is to ensure that stocks of marine mammals occurring in waters under U.S. jurisdiction do not experience a level of human-caused mortality and serious injury that is likely to cause the stock to be reduced below its *optimum sustainable population level* (OSP). OSP is defined as ''the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.''

To help accomplish the goal of maintaining marine mammal stocks at their OSPs, section 117 of the MMPA requires us and the National Marine Fisheries Service (NMFS) to prepare a SAR for each marine mammal stock that occurs in waters under U.S. jurisdiction. A SAR must be based on the best scientific information available; therefore, we prepare it in consultation with established regional scientific review groups. Each SAR must include: (1) A description of the stock and its geographic range; (2) a minimum population estimate, maximum net productivity rate, and current population trend; (3) an estimate of human-caused mortality and serious injury; (4) a description of commercial fishery interactions; (5) a categorization of the status of the stock; and (6) an estimate of the potential biological removal (PBR) level. The PBR is defined as ''the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its OSP.'' The PBR is the product of the minimum population estimate of the stock (N_{min}); one-half the maximum theoretical or estimated net productivity rate of the stock at a small population size (R_{max}); and a recovery factor (F_r) of between 0.1 and 1.0, which is intended to compensate for uncertainty and unknown estimation errors.

Section 117 of the MMPA also requires us and NMFS to review the SARs (a) at least annually for stocks that are specified as strategic stocks, (b) at least annually for stocks for which significant new information is available, and (c) at least once every 3 years for all other stocks.

A *strategic stock* is defined in the MMPA as a marine mammal stock (a) for which the level of direct human-caused mortality exceeds the PBR; (b) which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.;* ESA), within the foreseeable future; or (c) which is listed as a threatened or endangered species under the ESA, or is designated as depleted under the MMPA.

The following table summarizes the information we are now making available in the draft revised SARs for the Pacific walrus, the southern Beaufort Sea polar bear, and the Chukchi/Bering Seas polar bear stocks, listing each stock's N_{min}, R_{max}, F_r, PBR, annual estimated human-caused mortality and serious injury, and status. After consideration of any public comments we receive, we will revise any or all of these SARs, as appropriate. We will publish a notice of availability and summary for each final SAR, including responses to comments we received.

TABLE 1—SUMMARY: DRAFT REVISED STOCK ASSESSMENT REPORTS FOR THE PACIFIC WALRUS, SOUTHERN BEAUFORT SEA POLAR BEAR, AND CHUKCHI/BERING SEAS POLAR BEAR

Stock	N_{min}	R_{max}	F_r	PBR	Annual estimated average human-caused mortality and serious injury	Stock status
Pacific Walrus	15,164	0.08	1.0	607	4,963–5,460	Strategic.
Southern Beaufort Sea Polar Bear.	1,397	0.0603	0.5	22	33 (Alaska) 21 (Canada)	Strategic.
Chukchi/Bering Seas Polar Bear	2,000	0.0603	0.5	30	37 (Alaska) —(Russia)	Strategic.

Document Availability

Draft Revised SARs for Pacific Walrus, Southern Beaufort Sea Polar Bear, and Chukchi/Bering Seas Polar Bear

You may obtain copies by any one of the following methods:

- Internet: *http://alaska.fws.gov/fisheries/mmm/walrus/reports.htm* (for the walrus stock) and *http://alaska.fws.gov/fisheries/mmm/polarbear/reports.htm* (for both polar bear stocks).
- Write to or visit (during normal business hours from 8 a.m. to 4:30 p.m. Monday through Friday) the Chief, U.S. Fish and Wildlife Service, Marine Mammals Management Office, 1011 East Tudor Road, Anchorage, AK 99503; telephone: (800) 362–3800.

Public Comment

Draft Revised SARs for Pacific Walrus, Southern Beaufort Sea Polar Bear, and Chukchi/Bering Seas Polar Bear

You may submit a written comment by any one of the following methods:

- *E-mail: r7_mmm_comment@fws.gov.*
- *Mail or hand-delivery:* Chief, Marine Mammals Management Office (see address above).
- *Fax:* (907) 786–3816.

References

In accordance with the MMPA, we include in this notice a list of the information sources and public reports upon which we based the SARs.

Pacific Walrus

Burn, D.M., M.A. Webber, and M.S. Udevitz. 2006. Application of airborne thermal imagery to surveys of Pacific walrus. Wildlife Society Bulletin 34(1):51–58.

Chapskii, K.K. 1936. The walrus of the Kara Sea. Results of an investigation of the life history, geographical distribution, and stock of walruses in the Kara Sea. Transactions of the Arctic Institute 67:1–124.

Chivers, S.J. 1999. Biological indices for monitoring population status of walrus evaluated with an individual-based model. Pages 239–247 *In* Garner, G.W., S.C. Amstrup, J.L. Laake, B.F.J. Manly, L.L. McDonald, and D.G. Robertson (eds.), Marine Mammal Survey and Assessment Methods. A.A. Balkema, Rotterdam, 287 pp.

DeMaster, D.P. 1984. An analysis of a hypothetical population of walruses. Pages 77–80 *In* F.H. Fay and G.A. Fedoseev (eds.), Soviet-American Cooperative Research on

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Authority: The authority for this action is the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et al.*).

Dated: June 9, 2009.

Marvin Moriarty,

Acting Director, Fish and Wildlife Service.

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BILLING CODE 4310–55–P

INTERNATIONAL BOUNDARY AND WATER COMMISSION

United States Section; Notice of Availability of a Final Environmental Assessment and Final Finding of No Significant Impact for Flood Control Improvements to the Arroyo Colorado Floodway, Hidalgo and Cameron Counties, TX

AGENCY: United States Section, International Boundary and Water Commission, United States and Mexico.

ACTION: Notice of Availability of Final Environmental Assessment (EA) and Final Finding of No Significant Impact (FONSI).

SUMMARY: Pursuant to Section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality Final Regulations (40 CFR Parts 1500 through 1508), and the United States Section, International Boundary and Water Commission's (USIBWC) Operational Procedures for Implementing Section 102 of NEPA, published in the **Federal Register** September 2, 1981 (46 FR 44083); the USIBWC hereby gives notice of availability of the Final Environmental Assessment and FONSI for Flood Control Improvements to the Arroyo Colorado Floodway, a component of the

interior floodways system of the Lower Rio Grande Flood Control Project.

FOR FURTHER INFORMATION CONTACT: Rita Crites, Environmental Protection Specialist, Environmental Management Division, United States Section, International Boundary and Water Commission; 4171 N. Mesa, C–100; El Paso, Texas 79902. Telephone: (915) 832–4781; e-mail: *ritacrites@ibwc.gov*.

DATES: The Final EA and FONSI will be available June 11, 2009.

SUPPLEMENTARY INFORMATION:

Background

The Arroyo Colorado is an ancient distributary of the Rio Grande, and it serves as drainage for crop irrigation, municipal wastewater returns, and as a floodway during periods of heavy precipitation in the Lower Rio Grande Valley. The project area includes two segments of the flood control levee system with a combined length of 11 miles.

The USIBWC prepared this EA for the proposed action to increase flood control of the Arroyo Colorado Levee System by raising the elevation of these two levee segments for improved flood protection.

The beginning of this project is a 2.1 mile Divisor Dike near the juncture point of the Arroyo Colorado and the North Floodway in Hidalgo County, extending a total of 6.9 miles to the Willacy Canal. The remaining segment is 4.0 miles from the Willacy Canal ending at White Ranch Road in Cameron County, Texas.

Proposed Action

The proposed levee rehabilitation improvements consist of: (1) Raising the top-of-levee elevation, (2) conducting geotechnical investigations and testing to determine the type and extent of any required remediation improvements due to slope stability, seepage, levee settlement, and any other geotechnical issues that may cause levee failure; and (3) modifying, if necessary, hardware or structures located along the levee reaches. Any modifications will be in compliance with the Texas Historical Commission recommendations. The top elevation of the levee-raising improvements will be to provide containment of flood flows with a minimum freeboard of 3 feet for water surface elevations as calculated in the USIBWC 2003 Hydraulic Model for the LRGFCP. A centered levee expansion is assumed for most areas of the Arroyo Colorado Levee system, except south of La Feria reservoir, where levee expansion will be offset to the riverside of the existing levee.

The proposed action will increase the height of the levee up to 2 feet for approximately 8.6 percent of the 11-mile segment. Approximately 4 percent of the levee segment will be increased from 2 to 4 feet, and approximately 2.4 percent will be increased from 4 to 6 feet. The existing levee is a raised trapezoidal compacted-earth structure with a crown width of 16 feet, a typical height ranging from 10 to 15 feet, and approximately 3:1 side slope ratio (horizontal run: vertical rise). For a typical levee cross-section at the ACF that requires additional fill material to the crown the levee footprint would be expanded at a 1:6 ratio (crown height: footprint length). The footprint expansion would be equally divided between the riverside and landside (centered expansion) or entirely on one side (offset expansion). Moderately higher increases will be needed in a small segment that accounts for less than 1.2 percent of the total length. In areas where existing topography is too steep to allow levee expansion, construction solutions, including armored banks (riprap) or retaining walls, will be used. Excavation outside the existing right-of-way is not anticipated.

The EA assesses potential environmental impacts of the proposed action and the no action alternative. Potential impacts on natural, cultural, and other resources were evaluated, and mitigation measures were incorporated into the proposed action. A Finding of No Significant Impact was issued for the proposed action based on a review of the facts and analyses contained in the EA.

Summary of Findings

Pursuant to the National Environmental Policy Act (NEPA) guidance (40 CFR 1500–1508), The President's Council on Environmental Quality issued regulations for implementing NEPA, which included provisions for both the content and procedural aspects of the required EA. The USIBWC completed an EA of the potential environmental consequences of raising the Arroyo Colorado Floodway (ACF) levee system to meet current requirements for flood control. The EA, which supports this Finding of No Significant Impact, evaluated the proposed action and no action alternative.

Levee System Evaluation

No Action Alternative

The no action alternative was evaluated as the single alternative action to the proposed action. The no action alternative will retain the current configuration of the ACF levee system, with no impacts to biological and cultural resources, water resources, land use, soil, community resources, or environmental health issues. In terms of flood protection, however, current containment capacity under the no action alternative may be insufficient to fully control Rio Grande flooding under severe storm events, including associated risks to personal safety and property. The levee system will not meet FEMA requirements for levee system certification.

Proposed Action

Biological Resources

Biological resources in the vicinity of the levee systems are dominated by agricultural fields, rangelands, and non-native grasslands. There are some woody species along the margins of the Arroyo Colorado, drainage ditches from irrigation fields, and adjacent to borrow pits. The 160-foot wide biological survey corridor, centered on the existing levee, includes approximately 221 acres, primarily composed of non-native grasslands dominated by buffelgrass and king ranch bluestem.

The proposed action will raise the levee using a centered expansion, except in areas south of La Feria reservoir, where an offset expansion will be utilized. The proposed levee expansion will remove non-native grasslands on the levee slopes and adjacent areas. Native grasses will be planted immediately after the completion of the project, and the levee expansion will not occur in wooded areas. Less than one-half acre of non-jurisdictional wetlands will be affected, but no jurisdictional wetlands will be affected by the levee expansion. No habitats used by federally or state-listed threatened or endangered species will be impacted by the levee expansion.

In areas adjacent to sensitive areas such as water bodies, levee expansion may be altered to an offset expansion toward the riverside of the levee to avoid impacting sensitive resources. In areas where the existing topography is too steep to allow levee expansion, construction solutions, including armored banks, will prevent erosion of the levee slopes. The construction solutions will not affect sensitive habitats, including wooded areas, habitats for threatened and endangered species, or jurisdictional wetlands.

Cultural Resources

Improvements to the ACF levee system may adversely affect prehistoric and historic archaeological resources.

Some areas adjacent to the toe of the levee contain intact archaeological resources. Adverse effects to archaeological resources may occur from the use of heavy equipment during levee construction that could disturb surface or shallowly buried deposits. Adverse effects may also occur to archaeological deposits that will be buried by the addition of the fill material on the surface above them. Alternatively, levee footprint expansion may protect archaeological resources by capping with fill material, preserving those resources in place.

Architectural resources may be adversely affected by levee height increases or by expansion of the levee footprint. Potential effects include vibration and ground disturbance from the use of heavy equipment during construction. Design for levee improvements is primarily considering avoidance of the structures as much as possible. However, if structures have to be removed or modified, USIBWC will consult with the Texas Historical Commission (THC) to determine the appropriate level of documentation prior to any modification. In addition to documentation, mitigation of impacts to cultural resources may include their replacement with ''in-kind'' structures that will look and operate the same.

Native American resources may be affected by the levee improvements; consultation with the Native American tribes is ongoing to identify resources or concerns regarding the project.

Under NEPA, there will be no significant impacts (i.e., ''unresolvable'' adverse effects under National Historic Preservation Act [NHPA]) to cultural resources because all cultural resources will be identified and evaluated for National Register of Historic Places (NRHP) eligibility. Any impacts to National Register of Historic Places-eligible resources will be mitigated prior to implementation of levee height increases or footprint expansion, in consultation with the Texas Historical Commission and Native American Tribes.

Water Resources

Flood control improvements to the ACF will increase flood containment capacity to control the design flood event with a negligible increase in water surface elevation. Levee footprint expansion will not affect water bodies.

Land Use

Footprint levee expansion, where required, will take place completely within the existing ROW. No urban or agricultural lands will be affected.

Soil

Improvement activity contributing to soil disturbance will include geotechnical investigations and adding soil to the top and sides of the levee. Levee fill material will come from local commercial sources and not from borrow areas in the floodplain. The disturbance of soil will occur within areas where soil has been disturbed and modified by prior levee construction and maintenance activities. Therefore, alteration of soil previously unassociated with the existing levee will not occur.

Community Resources

In terms of socioeconomic resources, the influx of federal funds into Hidalgo and Cameron Counties from the flood control improvement area will have a positive but minor local economic impact. The impact will be limited to the construction period, and represent less than 1 percent of the annual county employment, income, and sales values. No adverse impacts to disproportionately high minority and low-income populations were identified for construction activities. Moderate utilization of public roads will be required during construction; a temporary increase in access road use will be required for equipment mobilization to staging areas.

Environmental Health Issues

Estimated air emissions of five criteria pollutants during construction will be discontinuous and represent less than 0.13 percent of the annual emissions inventory within the air quality control region of Hidalgo, Cameron, and Willacy Counties. There will be a moderate increase in ambient noise levels due to construction activities. No long-term and regular exposure is expected above noise threshold values. A database search indicated that no waste storage and disposal sites were within the proposed ACF levee improvement area, and none will affect, or be affected by, the levee improvement project.

Best Management Practices

When warranted due to engineering considerations, or for protection of biological or cultural resources, the need for levee footprint expansion will be eliminated by levee slope adjustment or use of retaining walls or armored banks. Best management practices during construction will include development of a storm water pollution prevention plan to avoid impacts to receiving waters, and use of sediment barriers and soil wetting to minimize erosion.

To protect vegetation cover, the embankment improvement areas will be re-vegetated with native herbaceous species. To protect wildlife, construction activities will be scheduled to occur, to the extent possible, outside the March to August bird migratory season.

Availability

Single hard copies of the Final Environmental Assessment and Finding of No Significant Impact may be obtained by request at the above contact information. Electronic copies may also be obtained from the USIBWC Home Page at *http://www.ibwc.gov/Organization/Environmental/reports_studies.html.*

Dated: June 12, 2009.

Robert McCarthy,

General Counsel.

[FR Doc. E9–14314 Filed 6–17–09; 8:45 am]

BILLING CODE 7010–01–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on June 3, 2009, a proposed Consent Decree in *United States* v. *General Electric Co.,* Civil Action No. 1:09–cv–00545, was lodged with the United States District Court for the District of New Mexico.

The Consent Decree resolves the United States' claims against General Electric Company (''GE'') at the South Valley Superfund Site located in Albuquerque, New Mexico. Those claims were brought under Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 107. The Site consists of several industrial facilities, including an aircraft manufacturing plant currently owned and/or operated by GE and formerly owned and/or operated by the United States Air Force (''USAF''), the United States Department of Energy (''DOE''), and others.

The Consent Decree requires that GE pay a lump sum of $257,670.00 to reimburse the United States for past response costs, a lump sum of $71,715 toward the United States' future response costs, and interest accrued on these two sums during the period from November 1, 2002 to the date of entry of the Consent Decree. The Consent Decree also memorializes the obligation of the USAF and DOE to pay a lump sum of $2,605,330.00 in reimbursement for past response costs and a lump sum

of $725,126.00 toward future response costs.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *General Electric Co.,* D.J. Ref. 90–11–2–443A.

The Consent Decree may be examined at the Office of the United States Attorney, District of New Mexico, 201 3rd Street, NW., Albuquerque, New Mexico 87102, and at U.S. EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202. During the public comment period, the Consent Decree, may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy by mail, from the Consent Decree Library, please enclose a check in the amount of $25.00 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E9–14289 Filed 6–17–09; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Comment Request for Information Collection for Petition and Investigative Forms To Assess Group Eligibility for Trade Adjustment Assistance (OMB Control No. 1205–0342), Extension

AGENCY: Employment and Training Administration.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. In response to Section 221(a) of Title II, Chapter 2 of the Trade Act of 1974, as amended by the American Recovery and Reinvestment Act (ARRA), the Employment and Training Administration is soliciting comments concerning the extension of the Petition and Investigative Forms to Assess Group Eligibility for Trade Adjustment Assistance, OMB Control No. 1205–0342, which expires November 30, 2009. This notice utilizes standard clearance procedures in accordance with the Paperwork Reduction Act of 1995 and 5 CFR 1320.12. This information collection follows an emergency review that was conducted in accordance with the Paperwork Reduction Act of 1995 and 5 CFR 1320.13. The submission for OMB emergency review was published in the **Federal Register** on April 29, 2009, see 74 FR 19602. OMB approved the emergency clearance under OMB control number 1205–0342 on May 15, 2009. A copy of this ICR can be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain.*

DATES: Written comments must be submitted to the office listed in the addressee's section below on or before August 17, 2009.

ADDRESSES: Susan Worden, U.S. Department of Labor, Employment and Training Administration, Room C–5428, 200 Constitution Avenue, NW., Washington, DC 20210. Phone: 202–693–3517, Fax: 202–693–3584, E-mail: *worden.susan@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. *Background:* On February 17, 2009, the President signed into law the American Recovery and Reinvestment Act (ARRA). Section 221(a) of Title II, Chapter 2 of the Trade Act of 1974, as amended by ARRA (19 U.S.C. 2271), authorizes the Secretary of Labor and the Governor of each State to accept petitions for certification of eligibility to apply for adjustment assistance. ARRA amended Section 222 of the Trade Act of 1974 to provide for new eligibility criteria designed to expand the number of petitioning worker groups assessed as adversely affected by trade and therefore determined eligible to apply for Trade Adjustment Assistance. To solicit the data needed to address the new eligibility criteria, ETA significantly expanded the petition and investigation forms under OMB No. 1205–0342.

The Forms ETA–9042 Petition for Trade Adjustment Assistance and its Spanish translation, and ETA–9042a Solicitud De Asistencia Para Ajuste, established a format for filing such petitions. The Department's regulations regarding petitions for worker adjustment assistance may be found at 29 CFR 90. Investigative forms designed to assess eligibility are undertaken in accordance with sections 222, 223 and 249 of the Trade Act of 1974, as amended (19 U.S.C., 2272 and 2273), are used by the Secretary of Labor to certify groups of workers as eligible to apply for worker trade adjustment assistance. The Forms include: ETA–9043a—Business Confidential Data Request Firms that Produce an Article (CDR–A); ETA–9043b—Business Confidential Data Request Firms that Supply a Service (CDR–S); ETA–9043c—Business Confidential Data Request Firms Who Work on a Contractual Basis; ETA–8562a—Business Confidential Customer Survey; ETA–8562a—Business Confidential Customer Survey; ETA–8562a—Business Confidential Customer Survey First Tier Purchases of Articles; ETA–8562a–1—Business Confidential Customer Survey Second Tier Purchases of Articles; ETA–8562b—Business Confidential Customer Survey Services; ETA–8562c—Business Confidential Customer Survey Firms who Work on a Contractual Basis; ETA–8562d—Business Confidential Customer Survey; and ETA–9118—Business Confidential Information Request.

II. Review Focus:

The Department of Labor is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility, and clarity of the information to be collected; and

* Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology,

e.g., permitting electronic submissions of responses.

III. Current Actions:

Type of Review: Extension.
Title: Investigative Data Collection Requirements for the Trade Act of 1974 as amended by the Trade and Globalization Adjustment Assistance Act of 2009.
OMB Number: 1205–0432.
Affected Public: Individuals or households; businesses or other for profits; and State, Local or Tribal Governments.
Forms: ETA–9042, 9042a, 9043a, 9043b, 9043c, 9118, 8562a, 8562b, 8562c, 8562d.
Total Respondents: 6916.
Frequency: Once.
Total Responses: 85675.
Average Time per Response: 2.22 Hours.
Estimated Total Burden Hours: 18642.
Total Burden Cost (operating/maintaining): $0.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: June 10, 2009.

Erin FitzGerald,

Program Manager, Division of Trade Adjustment Assistance, Office of National Response, Employment and Training Administration.

[FR Doc. E9–14337 Filed 6–17–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,396]

Cerro Flow Products, Inc., Sauget, IL; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated February 11, 2009, the United Steelworkers International Union (USW), District 7 requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) applicable to workers and former workers of the subject firm. The determination was issued on January 14, 2009. The Notice of Determination was published in the **Federal Register** on February 2, 2009 (74 FR 5871).

The initial investigation resulted in a negative determination based on the finding that imports of copper tubing did not contribute importantly to worker separations at the subject firm and no shift of production to a foreign source occurred.

In the request for reconsideration, the petitioner provided additional information regarding imports of copper tubing and alleged that the customers might have increased imports of copper tubing in the relevant period.

The Department has carefully reviewed the request for reconsideration and the existing record and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 10th day of June 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–14329 Filed 6–17–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,725]

Weather Shield Manufacturing, Inc., Corporate Office, Medford, WI; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated May 26, 2009, petitioners requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA), applicable to workers and former workers of the subject firm. The denial notice was signed on April 29, 2009 and published in the **Federal Register** on May 18, 2009 (74 FR 23214).

The negative determination was based on the Department's findings that imports of windows did not contribute importantly to worker separations at the subject facility and there was no shift of production to a foreign country. The ''contributed importantly'' test is generally demonstrated through a survey of the workers' firm's declining domestic customers. The survey of the major declining customers revealed no increasing imports of windows in 2008 when compared with 2007. The subject firm did not import windows during the relevant period.

The petitioner alleged that Weather Shield has experienced declines in sales on the corporate-wide scale throughout the United States.

The petition was filed specifically for the workers of the Weather Shield Manufacturing, Inc., Corporate Office in Milford, Wisconsin. The Department determined that workers of the subject firm are engaged in support functions such as administrative, human resources, accounting, sales, and marketing operations. It was also revealed that the workers of the subject firm support production of windows at various Weather Shield Manufacturing facilities. The Department has conducted investigation to determine there were shifts in production of windows from the production facilities to foreign countries, or whether imports of windows contributed importantly to worker separations. The investigation revealed that none of the production facilities which the workers of the subject firm support are import impacted and there was no shift in production from these facilities to a foreign country.

A careful review of previously-submitted material shows that one of the facilities supported by workers of the Weather Shield Manufacturing, Inc., Corporate Office in Milford, Wisconsin, may have produced articles in addition to windows. Therefore, the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974, as amended.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 2nd day of June 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–14331 Filed 6–17–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,246]

Weyerhaeuser NR Company, I–Level Lumber—Aberdeen Division; Aberdeen, WA; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated May 19, 2009, the Carpenters Industrial Council/United Brotherhood of Carpenters and Joiners of America, Local Union 3099 requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) applicable to workers and former workers of the subject firm. The determination was issued on May 8, 2009. The Notice of Determination will soon be published in the **Federal Register**.

The initial investigation resulted in a negative determination based on the finding that imports of softwood dimensional lumber, specifically Western Hemlock and Douglas Fir did not contribute importantly to worker separations at the subject firm and no shift of production to a foreign source occurred.

In the request for reconsideration, the petitioner provided additional information regarding imports of softwood dimensional lumber and alleged that the subject firm might have increased imports of softwood dimensional lumber in the relevant period. The petitioner also alleged that the subject firm might be eligible for TAA as secondary downstream producer of trade certified primary firm.

The Department has carefully reviewed the request for reconsideration and the existing record and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 10th day of June 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–14333 Filed 6–17–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,439]

Watson Laboratories, Inc., a Connecticut Corporation, Including Workers Located Off-Site in Danbury, CT, Carmel, NY; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on January 23, 2009, applicable to workers of Watson Laboratories, Inc., a Connecticut Corporation, Carmel, New York. The notice was published in the **Federal Register** on July 14, 2009 (73 FR 135).

At the request of the company official, the Department reviewed the certification for workers of the subject firm. The workers produce pharmaceuticals and medicines. New information provided by the company shows that the worker group included workers located off-site at an affiliated facility in Danbury, Connecticut.

The intent of the Department's certification is to include all workers at the subject firm who were adversely affected by the shift in production of pharmaceuticals and medicines to India and their subsequent import.

The Department has determined that the workers located in Carmel, New York and the workers located in Danbury, Connecticut are not separately identifiable by product.

Based on these findings, the Department is amending this certification to include workers of the subject firm working off-site at the Danbury, Connecticut location of the subject firm.

The amended notice applicable to TA–W–64,439 is hereby issued as follows:

''All workers of Watson Laboratories Inc., a Connecticut Corporation, including workers located off-site in Danbury, Connecticut, Carmel, New York, who became totally or partially separated from employment on or after May 27, 2007 through two years from the date of certification are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed in Washington, DC, this 18th day of May 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–14324 Filed 6–17–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,963; TA–W–63,963A; TA–W–63,963B]

Fisher Corporation; Troy, Sterling Heights, and St. Clair Shores, MI; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on September 11, 2008, applicable to Fisher Corporation, Troy, Michigan. The notice was published in the **Federal Register** on September 24, 2008 (73 FR 186).

At the request of a company official, the Department reviewed the certification for workers of the subject firm. New information shows that the company official filed for additional locations of Fisher Corporation including workers of 6550 Progress Dr., Sterling Heights, Michigan and 33195 Harper Ave., St. Clair Shores, Michigan locations. The impacted employees of Fisher Corporation produced formed metal automotive component parts.

The added locations of Fisher Corporation were not under existing certifications one year prior to the date on the current petition. There are multiple locations of Fisher Corporation in St. Clair Shores, Michigan. One location is currently certified under TA–W–63,529 and expires on June 30, 2010 and covers workers who produced recliner mechanisms for automobile seats.

The Department is amending this certification to include all impacted

employees of Fisher Corporation, 6550 Progress Dr., Sterling Heights, Michigan and 33195 Harper Ave., St. Clair Shores, Michigan that produced like or directly competitive articles as the Troy location and served the same customer base.

The intent of the Department's certification is to include all workers engaged in activities related to the production of formed metal automotive component parts of Fisher Corporation who were adversely affected secondary workers under Section 222 of the Trade Act of 1974, as amended.

The amended notice applicable to TA–W–63,963 is hereby issued as follows:

''All workers of Fisher Corporation located in Troy, Michigan (TA–W–63,963), who became totally or partially separated from employment on or after September 29, 2008 through September 11, 2010 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

All workers of Fisher Corporation, Sterling Heights, Michigan (TA–W–63,963A) and Fisher Corporation, 33195 Harper Ave., St. Clair Shores, Michigan (TA–W–63,963B), who became totally or partially separated from employment on or after September 1, 2007 through September 11, 2010 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC this 19th day of May 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–14325 Filed 6–17–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

TA–W–65,258, Shape Corporation, 1900 Hayes St. Plant, Grand Haven, MI; TA–W–65,258A, Shape Corporation, Shape Coatings, Grand Haven, MI; TA–W–65,258B, Shape Corporation, 1835 Hayes St. Plant, Grand Haven, MI; TA–W–65,258C, Shape Corporation, 1835 Industrial Park Dr. Plant, Grand Haven, MI; TA–W–65,258D, Shape Corporation, 14600 172 Ave Plant Grand Haven, MI; TA–W–65,258E, Shape Corporation, Shape Stamping Plant, Spring Lake, MI; TA–W–65,258F, Shape Corporation, Netshape Plant, Grand Haven, MI; TA–W–65,258G, Shape Corporation, 39625 Lewis Dr. Plant, Novi, MI

Amended Certification Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Notice of Certification Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on December 3, 2003, applicable to workers of Shape Corporation, Grand Haven, Michigan. The notice was published in the **Federal Register** on April 7, 2009 (74 FR 15757).

At the request of the petitioner, the Department reviewed the certification for workers of the subject firm. The workers were engaged in the production of a variety of products including bumpers, energy absorbers, truck bed supports, frame rail sets and J.K. rock rails.

The company reports that worker separations occurred at the following locations of the subject firm: 1900 Hayes St. Plant, Grand Haven, Michigan; Shape Coatings Plant, Grand Haven, Michigan; 1835 Hayes St. Plant, Grand Haven, Michigan; 1835 Industrial Park Dr. Plant, Grand Haven, Michigan; 14600 172 Ave Plant, Grand Haven, Michigan; Shape Stamping Plant, Spring Lake, Michigan; Netshape Plant, Grand Haven, Michigan; and 39625 Lewis Dr. Plant, Novi, Michigan. Workers at these locations were engaged in the production of articles that were the basis for the original certification of Shape Corporation, Grand Haven, Michigan (TA–W–65,258).

Accordingly, the Department is amending the certification to include workers of the above cited locations of the subject firm.

The intent of the Department's certification is to include all workers of Shape Corporation who were adversely affected as a supplier of component parts for articles produced by a firm with a currently TAA certified worker group.

—The amended notice applicable to TA–W–65,258 is hereby issued as follows:

''All workers of 1900 Hayes St. Plant, Grand Haven, Michigan (TA–W 65,258); Shape Coatings Plant, Grand Haven, Michigan (TA–W 65,258A); 1835 Hayes St. Plant, Grand Haven, Michigan (TA–W 65,258B); 1835 Industrial Park Dr. Plant, Grand Haven, Michigan (TA–W 65,258C); 14600 172 Ave Plant, Grand Haven, Michigan (TA–W 65,258D); Shape Stamping Plant, Spring Lake, Michigan (TA–W 65,258E); Netshape Plant, Grand Haven, Michigan (TA–W 65,258F); and the 39625 Lewis Dr. Plant, Novi, Michigan (TA–W 65,258G) locations of the subject firm who became totally or partially separated from employment on or after February 16, 2008 through March 16, 2011, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974 and are also eligible to apply for alternative trade adjustment under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 19th day of May 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–14326 Filed 6–17–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–61,347; TA–W–61,347A]

Wellman, Incorporated, Administrative Office, Also Known as Fiber Industries, Inc., Fort Mill, SC, Including Employees in Support of Wellman, Incorporated, Administrative Office, Also Known as Fiber Industries, Inc., Fort Mill, SC, Working Out of Fresh Meadow, NY and Commack, NY; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on May 4, 2007, applicable to workers of Wellman, Incorporated, Administrative Offices, Fort Mill, South Carolina. The notice was published in the **Federal Register**

on May 17, 2007 (72 FR 27853). The certification was amended on January 12, 2009 to include workers of the Administrative Office working out of Fresh Meadow, New York and Commack, New York. The notice was published in the **Federal Register** on January 12, 2009 (74 FR 4462).

At the request of the subject firm official, the Department reviewed the certification for workers of the subject firm. The workers are engaged in providing technical and administrative support services for the firm's production of polyester and nylon fibers.

New information shows that some of the workers' wages are being reported under a separate unemployment insurance (UI) tax account for Fiber Industries, Inc.

Accordingly, the Department is amending this certification to include workers of the subject firm whose UI wages are reported under the also known as name, Fiber Industries, Inc.

The intent of the Department's certification is to include all workers at Wellman, Incorporated, Administrative Offices, Fort Mill, South Carolina who were secondarily affected as an upstream supplier for a trade certified primary firm.

The amended notice applicable to TA–W–61,347 and TA–W–61,347A is hereby issued as follows:

''All workers of Wellman, Incorporated, Administrative Offices, also known as Fiber Industries, Inc., Fort Mill, South Carolina, (TA–W–61,347), including employees in support of Wellman, Incorporated, Administrative Offices, also known as Fiber Industries, Inc., Fort Mill, South Carolina, located in Fresh Meadow, New York and Commack, New York, New York (TA–W–61,347A), who became totally or partially separated from employment on or after April 11, 2006, through May 4, 2009, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC this 14th day of May 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–14328 Filed 6–17–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,526A]

North American Lighting, Inc., Salem, IL Plant, Including On-Site Leased Workers From Westaff, Manpower, and Salem Business Center, Salem, IL; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on April 21, 2009, applicable to workers of North American Lighting, Inc., Salem, IL Plant, Salem, Illinois including on-site leased workers from Westaff, Manpower, and Select. The notice was published in the **Federal Register** on May 7, 2009 (74 FR 21406).

At the request of a company official, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of exterior automotive lighting—signal lighting.

The company reports that it incorrectly identified Select as one of the three leasing agencies with workers working on-site at the Salem, Illinois location of North American Lighting, Salem IL Plant. Salem Business Center is the third leasing agency, not Select. Accordingly, the Department is amending the certification to remove Select as the leasing agency and replacing it with workers from Salem Business Center working on-site at the Salem, Illinois location of the subject firm.

The amended notice applicable to TA–W–64,526A is hereby issued as follows:

All workers of North American Lighting, Salem, IL Plant, Salem, Illinois, including on-site leased workers from Westaff, Manpower, and Salem Business Center, who became totally or partially separated from employment on or after November 21, 2007 through April 21, 2011, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC this 14th day of May 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–14330 Filed 6–17–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) number and alternative trade adjustment assistance (ATAA) by (TA–W) number issued during the period of May 11, 2009 through June 5, 2009.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made for secondarily affected workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss or business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of Section 246(a)(3)(A)(ii) of the Trade Act must be met.

1. Whether a significant number of workers in the workers' firm are 50 years of age or older.

2. Whether the workers in the workers' firm possess skills that are not easily transferable.

3. The competitive conditions within the workers' industry (*i.e.,* conditions within the industry are adverse).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W–65,827; Plasma Automation, Inc., Meadville, PA: April 20, 2008.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) of the Trade Act have been met.

TA–W–65,653; Munson Machinery Company, Utica, NY: March 11, 2008.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) of the Trade Act have been met.

None.

Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–64,828; Thomasville Furniture Industries, Inc., Conover 5, A Subsidiary of Furniture Brands International, Conover, NC: January 6, 2008.

TA–W–65,542; Momentive Performance Materials, Formerly Known As General Electric Newark Quartz, Hebron, OH: April 11, 2008.

TA–W–65,582; Collins and Aikman products Company, Corporate Headquarters, Detroit, MI: March 10, 2008.

TA–W–65,701; Imperium Grays Harbor, LLC, Hoquiam, WA: March 25, 2008.

TA–W–65,771; Weyerhaeuser NR Company, iLavel Division, Simsboro, LA: April 6, 2008.

TA–W–65,800; Bernhardt Furniture Company, Corporate Office, Lenoir, NC: March 31, 2008.

TA–W–65,337; Waverly Particleboard Company, LLC, Waverly, VA: February 20, 2008.

TA–W–65,384; Quality Mold, Inc., Erie, PA: February 24, 2008.

TA–W–65,643; Martin Aborn, Inc., Best Employment Agency, Hingham, MA: March 19, 2008.

TA–W–65,687; Tawas Tool Company, A Subsidiary of Star Cutter Company, East Tawas, MI: March 26, 2008.

TA–W–65,262; U.S. Steel Tubular Products, Inc., Including Paid under Star Tubular Services Div., Lone Star, TX: February 15, 2008.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–65,736; Idex Solutions, Working on-site at Daimler Trucks, Portland, OR: April 1, 2008.

TA–W–65,819; Williams International Company, LLC, Ogden, UT: April 13, 2008.

TA–W–65,296; ITW IMPRO, Mokena, IL: February 18, 2008.

TA–W–65,727; Hirotec America, Inc., Astrum Contract Services, LLC, Auburn Hills, MI: March 31, 2009.

TA–W–65,812; Weyerhaeuser Company, Dodson Veneer Technologies, Dodson, LA: April 15, 2008.

TA–W–65,889; Cooper Tire and Rubber Company, Findlay, OH: May 5, 2008.

TA–W–65,904; Grand Rapids Controls, CTC Charlton Acquisition, On-Site Leased Workers From Manpower, Rockford, MI: April 8, 2008.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–65,805; Weyerhaeuser NR Company, iLevel Division, Pine Hill, AL: April 14, 2008.

TA–W–65,850; Mold A Matic Corporation—Mamco, Also Known As Mamco, Oneonta, NY: April 23, 2008.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to

apply for TAA based on increased imports from or a shift in production to Mexico or Canada) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

None.

Negative Determinations for Alternative Trade Adjustment Assistance

In the following cases, it has been determined that the requirements of 246(a)(3)(A)(ii) have not been met for the reasons specified.

The Department has determined that criterion (1) of Section 246 has not been met. The firm does not have a significant number of workers 50 years of age or older.

TA–W–65,827; Plasma Automation, Inc., Meadville, PA.

The Department has determined that criterion (2) of Section 246 has not been met. Workers at the firm possess skills that are easily transferable.

TA–W–65,653; Munson Machinery Company, Utica, NY.

The Department has determined that criterion (3) of Section 246 has not been met. Competition conditions within the workers' industry are not adverse.

None.

Negative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

Because the workers of the firm are not eligible to apply for TAA, the workers cannot be certified eligible for ATAA.

The investigation revealed that criteria (a)(2)(A)(I.A.) and (a)(2)(B)(II.A.) (employment decline) have not been met.

TA–W–65,836; EDS, an HP Company, Application Development Services—Landes Division, Kokomo, IN.

The investigation revealed that criteria (a)(2)(A)(I.B.) (Sales or production, or both, did not decline) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

None.

The investigation revealed that criteria (a)(2)(A)(I.C.) (increased imports) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–65,138A; Sierra Pine, Martell Division, Martell, CA.

TA–W–65,138; Sierra Pine, Rocklin Division, Rocklin, CA.

TA–W–65,362; Governors America Corporation, Agawam, MA.

TA–W–65,628; St. Marys Tool and Die Company, St. Marys, PA.

TA–W–65,700; Weyerhaeuser, Raymond Lumbermill, Raymond, WA.

TA–W–65,725; Roseburg Forest Products, Engineered Wood Division, Riddle, OR.

TA–W–65,726; Caterpillar, Aurora, IL.

TA–W–65,760; Classic Leather, Inc., Hickory, NC.

TA–W–65,770A; Westport Shipyard, Inc., Hoquiam, WA.

TA–W–65,770B; Westport Shipyard, Inc., Port Angeles, WA.

TA–W–65,770C; Westport Shipyard, Inc., La Conner, WA.

TA–W–65,770; Westport Shipyard, Inc., Westport, WA.

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

None.

The investigation revealed that criteria of Section 222(b)(2) has not been met. The workers' firm (or subdivision) is not a supplier to or a downstream producer for a firm whose workers were certified eligible to apply for TAA.

None.

I hereby certify that the aforementioned determinations were issued during the period of May 11, 2009 through June 5, 2009. Copies of these determinations are available for inspection in Room N–5428, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: June 12, 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–14327 Filed 6–17–09; 8:45 am]

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DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,467]

Kenworth Truck Company, a Subsidiary of Paccar, Inc., Renton, WA; Notice of Negative Determination Regarding Application for Reconsideration

By application dated May 7, 2009, International Association of Machinists and Aerospace Workers, District Lodge, No. 160 requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA), applicable to workers and former workers of the subject firm. The denial notice was signed on April 14, 2009 and published in the **Federal Register** on April 30, 2009 (74 FR 19996).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The initial investigation resulted in a negative determination based on the finding that imports of class 8 heavy duty trucks did not contribute importantly to worker separations at the subject facility and there was no shift of production to a foreign country. The subject firm did not import class 8 heavy duty trucks during the relevant period. The ''contributed importantly'' test is generally demonstrated through a survey of the workers' firm's declining domestic customers. In this case the survey was not conducted because the customers purchased all Class 8 heavy duty trucks exclusively from the subject firm.

The petitioner alleged that subject firm's competitors import heavy trucks and parts of heavy trucks, thus having an advantage over the subject firm in locating potential customers.

The impact of competitors on the domestic firms is revealed in an investigation through customer surveys and aggregate import analysis. In the case at hand, the Department solicited information from the customers of the subject firm to determine if customers purchased imported Class 8 heavy duty trucks. The information was intended to determine if competitor imports contributed importantly to layoffs at the subject firm. The investigation revealed no imports of Class 8 heavy duty trucks during the relevant period. The subject firm did not import class 8 heavy duty trucks nor was there a shift in production of class 8 heavy duty trucks from subject firm abroad during the relevant period. Furthermore, U.S. aggregate imports of Class 8 heavy duty trucks have been declining since 2006.

The petitioner also stated that other divisions of Kenworth Truck Company and a supplier of interior components for heavy duty trucks have been recently certified for TAA and thus workers of the subject facility should also be eligible for TAA.

The Kenworth Truck Company divisions indicated by the petitioner were certified eligible for TAA in January 2009 since the company shifted production of cabs for Class 8 trucks to Mexico. The certifications of these divisions are not relevant to this investigation as certified workers engaged in production of cabs are separately identifiable from workers of the subject firm who are engaged in production of Class 8 heavy duty trucks. The certification of a company supplying interior components for heavy duty trucks is also not relevant to this investigation.

When assessing eligibility for TAA, the Department exclusively considers shift in production of articles like or directly competitive with the ones manufactured at the subject firm during the relevant period (one year prior to the date of the petition). The issue of a shift in production by the subject firm to a foreign country was addressed during the initial investigation. It was revealed that the subject firm did not shift production of Class 8 heavy duty trucks during the relevant period.

The petitioner did not supply facts not previously considered; nor provide additional documentation indicating that there was either (1) a mistake in the determination of facts not previously considered or (2) a misinterpretation of facts or of the law justifying reconsideration of the initial determination.

After careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 19th day of May 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–14323 Filed 6–17–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,979]

Fiberweb, PLC, Simpsonville, SC; Notice of Negative Determination on Reconsideration

On May 12, 2009, the Department issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of the subject firm. The notice will soon be published in the **Federal Register**.

The initial investigation resulted in a negative determination based on the finding that imports of filtration media did not contribute importantly to worker separations at the subject firm and no shift of production to a foreign source occurred.

In the request for reconsideration, the petitioner alleged that the workers of the subject firm also produced non-filtration products, specifically nonwoven fabrics used in medical applications, hygiene applications and nonwoven rolled goods. The petitioner also alleged that the subject firm shifted production of non-filtration products abroad and that there was an increase in imports of non-filtration products.

The Department of Labor contacted a company official to verify this information. The company official stated that the subject firm ceased production of the non-filtration products at the end of 2006 and that none of the articles outlined by the petitioner were manufactured by workers of the subject firm since 2006.

When assessing eligibility for TAA, the Department exclusively considers production and import impact during the relevant time period (one year prior to the date of the petition). Therefore, events occurring prior to January 22, 2008 are outside of the relevant period and are not relevant in this investigation.

Conclusion

After reconsideration, I affirm the original notice of negative determination of eligibility to apply for worker adjustment assistance for workers and former workers of Fiberweb, PLC, Simpsonville, South Carolina.

Signed at Washington, DC, this 9th day of June 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–14332 Filed 6–17–09; 8:45 am]

BILLING CODE 4510–FN–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–424 and 50–425; NRC–2009–0241]

Southern Nuclear Operating Company; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards, Consideration Determination, and Opportunity for a Hearing, and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) for Contention Preparation

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License Nos. NPF–68 and NPF–81 issued to Southern Nuclear Operating Company (the licensee) for operation of the Vogtle Electric Generating Plant, Units 1 and 2, located in Burke County, Georgia.

The proposed amendment would revise Technical Specification (TS) 5.5.9, ''Steam Generator (SG) Program,'' to exclude portions of the tubes within the tubesheet from periodic SG inspections. In addition, this amendment proposes to revise TS 5.6.10, ''Steam Generator Tube Inspection Report'' to remove reference to previous interim alternate repair criteria and provide reporting requirements specific to the permanent alternate repair criteria. The proposed change defines the safety significant portion of the tube that must be inspected and repaired. The amendment application dated May 19, 2009, contains sensitive unclassified non-safeguards information (SUNSI).

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in Title 10 of the Code of Federal Regulations (10 CFR), Section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant

hazards consideration, which is presented below:

(1) Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The previously analyzed accidents are initiated by the failure of plant structures, systems, or components. The proposed change that alters the steam generator inspection criteria and the steam generator inspection reporting criteria does not have a detrimental impact on the integrity of any plant structure, system, or component that initiates an analyzed event. The proposed change will not alter the operation of, or otherwise increase the failure probability of any plant equipment that initiates an analyzed accident.

Of the applicable accidents previously evaluated, the limiting transients with consideration to the proposed change to the steam generator tube inspection and repair criteria are the steam generator tube rupture (SGTR) event and the feedline break (FLB) postulated accidents.

During the SGTR event, the required structural integrity margins of the steam generator tubes and the tube-to-tubesheet joint over the H* distance will be maintained. Tube rupture in tubes with cracks within the tubesheet is precluded by the constraint provided by the tube-to-tubesheet joint. This constraint results from the hydraulic expansion process, thermal expansion mismatch between the tube and tubesheet, and from the differential pressure between the primary and secondary side. Based on this design, the structural margins against burst, as discussed in Regulatory Guide (RG) 1.121, ''Bases for Plugging Degraded PWR Steam Generator Tubes,'' (Reference 10) are maintained for both normal and postulated accident conditions.

The proposed change has no impact on the structural or leakage integrity of the portion of the tube outside of the tubesheet. The proposed change maintains structural integrity of the steam generator tubes and does not affect other systems, structures, components, or operational features. Therefore, the proposed change results in no significant increase in the probability of the occurrence of a SGTR accident.

At normal operating pressures, leakage from primary water stress corrosion cracking below the proposed limited inspection depth is limited by both the tube-to-tubesheet crevice and the limited crack opening permitted by the tubesheet constraint. Consequently, negligible normal operating leakage is expected from cracks within the tubesheet region. The consequences of an SGTR event are affected by the primary-to-secondary leakage flow during the event. However, primary-to-secondary leakage flow through a postulated broken tube is not affected by the proposed changes since the tubesheet enhances the tube integrity in the region of the hydraulic expansion by precluding tube deformation beyond its initial hydraulically expanded outside diameter. Therefore, the proposed changes do not result in a significant increase in the consequences of a SGTR.

The consequences of a steam line break (SLB) are also not significantly affected by the proposed changes. During a SLB accident, the reduction in pressure above the tubesheet on the shell side of the steam generator creates an axially uniformly distributed load on the tubesheet due to the reactor coolant system pressure on the underside of the tubesheet. The resulting bending action constrains the tubes in the tubesheet thereby restricting primary-to-secondary leakage below the midplane.

Primary-to-secondary leakage from tube degradation in the tubesheet area during the limiting accident (*i.e.,* a SLB) is limited by flow restrictions. These restrictions result from the crack and tube-to-tubesheet contact pressures that provide a restricted leakage path above the indications and also limit the degree of potential crack face opening as compared to free span indications.

The leakage factor of 2.02 for Vogtle Electric Generating Plant (VEGP), for a postulated SLB/FLB, has been calculated as shown in Table 9–7 of Reference 5. The leakage factor of 2.03 is a bounding value for all steam generators, both hot and cold legs, in Table 9–7 of Reference 5. Specifically, for the condition monitoring (CM) assessment, the component of leakage from the prior cycle from below the H* distance will be multiplied by a factor of 2.03 and added to the total leakage from any other source and compared to the allowable accident induced leakage limit. For the operational assessment (OA), the difference in the leakage between the allowable leakage and the accident induced leakage from sources other than the tubesheet expansion region will be divided by 2.03 and compared to the observed operational leakage.

The probability of a SLB is unaffected by the potential failure of a steam generator tube as the failure of the tube is not an initiator for a SLB event. SLB leakage is limited by leakage flow restrictions resulting from the leakage path above potential cracks through the tube-to-tubesheet crevice. The leak rate during postulated accident conditions (including locked rotor) has been shown to remain within the accident analysis assumptions for all axial and or circumferentially orientated cracks occurring 13.1 inches below the top of the tubesheet. The accident induced leak rate limit is 1.0 gpm. The TS operational leak rate is 150 gpd (0.1 gpm) through any one steam generator. Consequently, there is significant margin between accident leakage and allowable operational leakage. The SLB/FLB leak rate ratio is only 2.03 resulting in significant margin between the conservatively estimated accident leakage and the allowable accident leakage (1.0 gpm).

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

(2) Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change that alters the steam generator inspection criteria and the steam generator inspection reporting criteria does not introduce any new equipment, create new failure modes for existing equipment, or create any new limiting single failures. Plant operation will not be altered, and all safety functions will continue to perform as previously assumed in accident analyses.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

(3) Does the change involve a significant reduction in a margin of safety?

Response: No.

The proposed change that alters the steam generator inspection criteria and the steam generator inspection reporting criteria maintains the required structural margins of the steam generator tubes for both normal and accident conditions[.] NEI 97–06, Revision 2, ''Steam Generator Program Guidelines'' (Reference 6) and RG 1.121, are used as the bases in the development of the limited tubesheet inspection depth methodology for determining that steam generator tube integrity considerations are maintained within acceptable limits. RG 1.121 describes a method acceptable to the NRC for meeting GDC 14, ''Reactor Coolant Pressure Boundary,'' GDC 15, ''Reactor Coolant System Design,'' GDC 31, ''Fracture Prevention of Reactor Coolant Pressure Boundary,'' and GDC 32, ''Inspection of Reactor Coolant Pressure Boundary,'' by reducing the probability and consequences of a SGTR. RG 1.121 concludes that by determining the limiting safe conditions for tube wall degradation the probability and consequences of a SGTR are reduced. This RG uses safety factors on loads for tube burst that are consistent with the requirements of Section III of the American Society of Mechanical Engineers (ASME) Code.

For axially oriented cracking located within the tubesheet, tube burst is precluded due to the presence of the tubesheet. For circumferentially oriented cracking, WCAP–17071–P, ''H*: Alternate Repair Criteria for the Tubesheet Expansion Region in Steam Generators with Hydraulically Expanded Tubes (Model F),'' defines a length of degradation free expanded tubing that provides the necessary resistance to tube pullout due to the pressure induced forces, with applicable safety factors applied. Application of the limited hot and cold leg tubesheet inspection criteria will preclude unacceptable primary-to-secondary leakage during all plant conditions. The methodology for determining leakage provides for large margins between calculated and actual leakage values in the proposed limited tubesheet inspection depth criteria.

Therefore, the proposed change does not involve a significant reduction in any margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received

within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking and Directives Branch, TWB–05–B01M, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 2007, 72 FR 49139 (Aug. 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the petitioner/requestor should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov*, or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a

component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html*. Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*.

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory e-filing system may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC electronic filing Help Desk, which is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays. The toll-free help line number is (866) 672–7640. A person filing electronically may also seek assistance by sending an e-mail to the NRC electronic filing Help Desk at *MSHD.Resource@nrc.gov*.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission the presiding officer or the Atomic Safety and Licensing Board that the request and/or petition should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/ehd_proceeding/home.asp,* unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, Participants are requested not to include copyrighted materials in their submissions.

For further details with respect to this license amendment application, see the application for amendment dated May 19, 2009, which is available for public inspection at the Commission's PDR, located at One White Flint North, File Public Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov*.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) for Contention Preparation

1. This order contains instructions regarding how potential parties to this proceeding may request access to documents containing sensitive unclassified information.

2. Within ten (10) days after publication of this notice of opportunity for hearing, any potential party as defined in 10 CFR 2.4 who believes access to SUNSI is necessary for a response to the notice may request access to such information. A ''potential party'' is any person who intends or may intend to participate as a party by demonstrating standing and the filing of an admissible contention under 10 CFR 2.309. Requests submitted later than ten (10) days will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

3. The requester shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, MD 20852. The e-mail address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *OGCMailCenter.Resource@nrc.gov*, respectively.[1] The request must include the following information:

a. A description of the licensing action with a citation to this **Federal Register** notice of opportunity for hearing;

b. The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the potential licensing;

c. The identity of the individual requesting access to SUNSI and the

[1] *See* footnote 6. While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

requester's need for the information in order to meaningfully participate in this adjudicatory proceeding, particularly why publicly available versions of the application would not be sufficient to provide the basis and specificity for a proffered contention;

4. Based on an evaluation of the information submitted under items 2 and 3.a through 3.c above, the NRC staff will determine within ten days of receipt of the written access request whether (1) there is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding, and (2) there is a legitimate need for access to SUNSI.

5. A request for access to SUNSI will be granted if:

a. The request has demonstrated that there is a reasonable basis to believe that a potential party is likely to establish standing to intervene or to otherwise participate as a party in this proceeding;

b. The proposed recipient of the information has demonstrated a need for SUNSI;

c. The proposed recipient of the information has executed a Non-Disclosure Agreement or Affidavit and agrees to be bound by the terms of a Protective Order setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI; and

d. The presiding officer has issued a protective order concerning the information or documents requested.[2] Any protective order issued shall provide that the petitioner must file SUNSI contentions 25 days after receipt of (or access to) that information. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

6. If the request for access to SUNSI is granted, the terms and conditions for access to such information will be set forth in a draft protective order and affidavit of non-disclosure appended to a joint motion by the NRC staff, any other affected parties to this proceeding,[3] and the petitioner(s). If the diligent efforts by the relevant parties or petitioner(s) fail to result in an agreement on the terms and conditions for a draft protective order or non-disclosure affidavit, the relevant parties to the proceeding or the petitioner(s) should notify the presiding officer within five (5) days, describing the obstacles to the agreement.

7. If the request for access to SUNSI is denied by the NRC staff, the NRC staff shall briefly state the reasons for the denial. The requester may challenge the NRC staff's adverse determination with respect to access to SUNSI (including with respect to standing) by filing a challenge within five (5) days of receipt of that determination with (a) the presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to § 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

In the same manner, a party other than the requester may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed within five (5) days of the notification by the NRC staff of its grant of such a request.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[4]

8. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR Part 2.

Dated at Rockville, Maryland, this 12th day of June 2009.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

Attachment 1—General Target Schedule for Processing and Resolving Requests for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) in This Proceeding

Day	Event
0	Publication of FEDERAL REGISTER notice, including order with instructions for access requests.
10	Deadline for submitting requests for access to SUNSI with information: supporting the standing of a potential party identified by name and address; and describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding.
60	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 petitioner/requestor reply).
20	NRC staff informs the requester of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information. If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents).

[2] If a presiding officer has not yet been designated, the Chief Administrative Judge will issue such orders, or will appoint a presiding officer to do so.

[3] Parties/persons other than the requester and the NRC staff will be notified by the NRC staff of a favorable access determination (and may participate in the development of such a motion and protective order) if it concerns SUNSI and if the party/person's interest independent of the proceeding would be harmed by the release of the information (*e.g.,* as with proprietary information).

[4] As of October 15, 2007, the NRC's final ''E–Filing Rule'' became effective. *See* Use of Electronic Submissions in Agency Hearings (72 FR 49139; Aug. 28, 2007). Requesters should note that the filing requirements of that rule apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI requests submitted to the NRC staff under these procedures.

Day	Event
25	If NRC staff finds no ''need'' for SUNSI or likelihood of standing, the deadline for petitioner/requester to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds ''need'' for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI.
A	If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A+3	Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order.
A+28	Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.
A+53 (Contention receipt +25)	Answers to contentions whose development depends upon access to SUNSI.
A+60 (Answer receipt +7)	Petitioner/Intervenor reply to answers.
B	Decision on contention admission.

[FR Doc. E9–14305 Filed 6–17–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the Materials, Metallurgy, and Reactor Fuels Subcommittee; Notice of Meeting

The ACRS Subcommittee on the Materials, Metallurgy and Reactor Fuels will hold a meeting on July 7, 2009, 11545 Rockville Pike, Room T2–B3, Rockville, Maryland.

The entire meeting will be open to public attendance. The agenda for the subject meeting shall be as follows:

Tuesday, July 7, 2009—1:30 p.m.–5 p.m.

The Subcommittee will discuss the technical approach and programmatic justification for the Materials and Metallurgy research projects, sponsored by the Office of Nuclear Regulatory Research. The Subcommittee will hear presentations by and hold discussions with representatives of the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official, Christopher Brown (Telephone: 301–415–7111) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Electronic recordings will be permitted. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 6, 2008 (73 FR 58268–58269).

Further information regarding this meeting can be obtained by contacting the Designated Federal Official between 6:45 a.m. and 3:30 p.m. (ET). Persons planning to attend this meeting are urged to contact the above named individual at least two working days prior to the meeting to be advised of any potential changes to the agenda.

Dated: June 12, 2009.

Cayetano Santos,

Chief, Reactor Safety Branch A, Advisory Committee on Reactor Safeguards.

[FR Doc. E9–14304 Filed 6–17–09; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–28767; File No. 812–13495]

Nationwide Life Insurance Company, et al.

June 12, 2009.

AGENCY: Securities and Exchange Commission.

ACTION: Notice of application for an order pursuant to Section 26(c) of the Investment Company Act of 1940 (the ''1940 Act'') and an order of exemption pursuant to Section 17(b) of the 1940 Act from Section 17(a) of the 1940 Act.

Applicants: Nationwide Life Insurance Company (''NWL''), Nationwide Variable Account—II (''Account II''), Nationwide Variable Account—7 (''Account 7''), Nationwide Variable Account—9 (''Account 9''), Nationwide Variable Account—14 (''Account 14''), Nationwide Multi-Flex Variable Account (''Flex Account''), Nationwide VLI Separate Account—2 (''Account 2''), Nationwide VLI Separate Account—4 (''Account 4''), Nationwide VLI Separate Account—7 (''VLI Account 7''), Nationwide Life and Annuity Insurance Company (''NLAIC''), Nationwide VL Separate Account—G (''Account G''), Nationwide Life Insurance Company of America (''NLICA''), Nationwide Provident VLI Separate Account 1 (''Account 1''), Nationwide Life and Annuity Company of America (''NLACA'' and together with NWL, NLAIC and NLICA, ''Insurance Company Applicants''), Nationwide Provident VA Separate Account A (''Account A''), and Nationwide Provident VLI Separate Account A (''VLI Account A'' and together with Account II, Account 7, Account 9, Account 14, Flex Account, Account 2, VLI Account 7, Account G, Account 1, and Account A, ''Separate Accounts'' and, together with Insurance Company Applicants, ''Section 26 Applicants''), and Nationwide Variable Insurance Trust (''NVIT'' and together with Section 26 Applicants, ''Section 17 Applicants'').

SUMMARY: *Summary of Application:* Section 26 Applicants seek an order pursuant to Section 26(c) of the 1940 Act, approving the substitutions of certain securities (the ''Substitutions'') issued by certain management investment companies and held by Separate Accounts to support certain

variable annuity contracts and variable life insurance contracts (the ''Contracts'') issued by Insurance Company Applicants. Section 17 Applicants seek an order pursuant to Section 17(b) of the 1940 Act exempting them from Section 17(a) of the 1940 Act to the extent necessary to permit them to effectuate the proposed Substitutions by redeeming a portion of the securities of one or more of the Existing Funds (as defined herein) in-kind and using those securities received to purchase shares of the Replacement Funds (as defined herein) (the ''In-Kind Transactions'').

DATES: *Filing Date:* The application was originally filed on February 11, 2008 and amended on June 25, 2008, March 9, 2009 and June 12, 2009.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving Insurance Company Applicants and NVIT with a copy of the request, personally or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on July 7, 2009, and should be accompanied by proof of service on Insurance Company Applicants and NVIT in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requester's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary of the Commission.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Insurance Company Applicants and NVIT, c/o Jamie Ruff Casto, Managing Counsel, Nationwide Insurance, One Nationwide Plaza 1–34–201, Columbus, Ohio 43215.

FOR FURTHER INFORMATION CONTACT: Craig Ruckman, Attorney-Adviser, at (202) 551–6753 or Harry Eisenstein, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 551–6795.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. NWL is a stock life insurance company organized under the laws of the State of Ohio. NLAIC is a stock life insurance company organized under the laws of the State of Ohio. NLICA is a stock life insurance company organized under the laws of the State of Pennsylvania. NLACA is a stock life insurance company organized under the laws of the State of Pennsylvania.

2. Each of the following separate accounts are registered as unit investment trusts under the 1940 Act and are used to fund certain variable contracts issued by NWL: Account II (File No. 811–3330); Account 7 (File No. 811–8666); Account 9 (File No. 811–08241); Account 14 (File No. 811–21205); Flex Account (File No. 811–3338); Account 2 (File No. 811–5311); Account 4 (File No. 811–8301); and, VLI Account 7 (File No. 811–21610).

Each of the following separate accounts are registered as unit investment trusts under the 1940 Act and are used to fund certain variable contracts issued by NLACA: Account A (File No. 811–6484); and, VLI Account A (File No. 811–8722).

Account G is registered as a unit investment trust under the 1940 Act (File No. 811–21697) and is used to fund certain variable contracts issued by NLAIC.

Account 1 is registered as a unit investment trust under the 1940 Act (File No. 811–4460) and is used to fund certain variable contracts issued by NLICA.

3. For purposes of the 1940 Act, NWL is the depositor and sponsor of Account II, Account 7, Account 9, Account 14, Flex Account, Account 2, Account 4, and VLI Account 7; NLAIC is the depositor and sponsor of Account G; NLICA is the depositor and sponsor of Account 1; and NLACA is the depositor and sponsor of Account A and VLI Account A as those terms have been interpreted by the Commission with respect to variable annuity and variable life insurance separate accounts.

4. The Contracts can be issued as individual or group contracts, with participants of group contracts acquiring certain ownership rights as described in the group contract or the plan documents. Contract owners and participants in group contracts (each a ''Contract Owner'') may allocate some or all of their Contract value to one or more sub-accounts available as investment options under the Contract (each an ''Investment Option''). Each such Investment Option corresponds to an underlying mutual fund in which the Separate Account invests. Additionally, the Contract Owner may, if provided for under the Contract, allocate some or all Contract value to a fixed account and/or guaranteed term option, both of which are supported by the assets of the depositor's general account.

Each Contract permits the Contract Owner to transfer Contract value from one Investment Option to another Investment Option available under the Contract at any time, subject to certain restrictions and charges described in the prospectuses for the Contracts. To the extent that the Contracts contain restrictions or limitations on a Contract Owner's right to transfer, such restrictions or limitations will not apply in connection with the proposed Substitutions.

5. Each Contract's prospectus contains provisions reserving Insurance Company Applicants' right to substitute shares of one Investment Option for shares of another Investment Option already purchased or to be purchased in the future if either of the following occurs: (i) Shares of a current Investment Option are no longer available for investment by the Separate Account; or (ii) in the judgment of Insurance Company Applicants' management, further investment in such Investment Option is inappropriate in view of the purposes of the Contract. Each Insurance Company Applicant's management has determined that further investment in the Existing Funds is no longer appropriate in view of the purposes of the Contracts.

6. Each Insurance Company Applicant, on its own behalf and on behalf of its Separate Accounts, proposes to exercise its contractual right to substitute a different Investment Option for one of the current Investment Options available under the Contracts. In particular, Section 26 Applicants request an order from the Commission pursuant to Section 26(c) of the 1940 Act approving the proposed Substitutions of shares of the following Funds (as defined herein) of NVIT (the ''Replacement Funds'') for shares of the corresponding underlying mutual funds (the ''Existing Funds''), as shown in the following Substitution table (''Substitution Table''):

Ref. No.	Existing funds	Replacement funds
1	AIM Variable Insurance Funds—AIM V.I. Basic Value Fund: Series I Shares.	NVIT—NVIT Multi-Manager Large Cap Value Fund: Class I.

Ref. No.	Existing funds	Replacement funds
2	AIM Variable Insurance Funds—AIM V.I. Basic Value Fund: Series II Shares.	NVIT—NVIT Multi-Manager Large Cap Value Fund: Class II.
3	AIM Variable Insurance Funds—AIM V.I. Large Cap Growth Fund: Series I Shares.	NVIT—NVIT Multi-Manager Large Cap Growth Fund: Class I.
4	American Century Variable Portfolios, Inc.—American Century VP Capital Appreciation Fund: Class I.	NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I.
5	American Century Variable Portfolios, Inc.—American Century VP International Fund: Class I.	NVIT—NVIT Multi-Manager International Growth Fund: Class III.
6	American Century Variable Portfolios, Inc.—American Century VP International Fund: Class II.	NVIT—NVIT Multi-Manager International Growth Fund: Class VI.
7	American Century Variable Portfolios, Inc.—American Century VP International Fund: Class III.	NVIT—NVIT Multi-Manager International Growth Fund: Class III.
8	American Century Variable Portfolios, Inc.—American Century VP International Fund: Class IV.	NVIT—NVIT Multi-Manager International Growth Fund: Class VI.
9	American Century Variable Portfolios, Inc.—American Century VP Ultra Fund: Class I.	NVIT—NVIT Multi-Manager Large Cap Growth Fund: Class I.
10	American Century Variable Portfolios, Inc.—American Century VP Ultra Fund: Class II.	NVIT—NVIT Multi-Manager Large Cap Growth Fund: Class II.
11	American Century Variable Portfolios, Inc.—American Century VP Vista Fund: Class I.	NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I.
12	American Century Variable Portfolios, Inc.—American Century VP Vista Fund: Class II.	NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I.
13	American Century Variable Portfolios, Inc.—American Century VP Vista Fund: Class II.	NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class II.
14	Credit Suisse Trust—International Equity Flex I Portfolio (formerly, International Focus Portfolio).	NVIT—Gartmore NVIT International Equity Fund: Class I.
15	Credit Suisse Trust—International Equity Flex I Portfolio (formerly, International Focus Portfolio).	NVIT—Gartmore NVIT International Equity Fund: Class III.
16	Federated Insurance Series—Federated Quality Bond Fund II: Primary Shares.	NVIT—NVIT Core Bond Fund: Class I.
17	Federated Insurance Series—Federated Quality Bond Fund II: Service Shares.	NVIT—NVIT Core Bond Fund: Class II.
18	Franklin Templeton Variable Insurance Products Trust—Templeton Developing Markets Securities Fund: Class 3.	NVIT—Gartmore NVIT Emerging Markets Fund: Class III.
19	Franklin Templeton Variable Insurance Products Trust—Templeton Developing Markets Securities Fund: Class 3.	NVIT—Gartmore NVIT Emerging Markets Fund: Class VI.
20	Janus Aspen Series—INTECH Risk-Managed Core Portfolio: Service Shares.	NVIT—NVIT Nationwide Fund: Class I.
21	Janus Aspen Series—INTECH Risk-Managed Core Portfolio: Service Shares.	NVIT—NVIT Nationwide Fund: Class II.
22	Neuberger Berman Advisers Management Trust—AMT Growth Portfolio: I Class.	NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I.
23	Neuberger Berman Advisers Management Trust—AMT Guardian Portfolio: I Class.	NVIT—Neuberger Berman NVIT Multi Cap Opportunities Fund: Class I.
24	Neuberger Berman Advisers Management Trust—AMT International Portfolio: S Class.	NVIT—Gartmore NVIT International Equity Fund: Class III.
25	Neuberger Berman Advisers Management Trust—AMT International Portfolio: S Class.	NVIT—Gartmore NVIT International Equity Fund: Class VI.
26	Neuberger Berman Advisers Management Trust—AMT Mid-Cap Growth Portfolio: I Class.	NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I.
27	Neuberger Berman Advisers Management Trust—AMT Mid-Cap Growth Portfolio: S Class.	NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I.
28	Neuberger Berman Advisers Management Trust—AMT Mid-Cap Growth Portfolio: S Class.	NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class II.
29	Neuberger Berman Advisers Management Trust—AMT Partners Portfolio: I Class.	NVIT—Neuberger Berman NVIT Multi Cap Opportunities Fund: Class I.
30	Neuberger Berman Advisers Management Trust—AMT Regency Portfolio: S Class.	NVIT—NVIT Multi-Manager Mid Cap Value Fund: Class II.
31	T. Rowe Price Equity Series, Inc.—T. Rowe Price Limited Term Bond Portfolio: Class II.	NVIT—NVIT Short Term Bond Fund: Class II.
32	The Universal Institutional Funds, Inc.—Mid Cap Growth Portfolio: Class I.	NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I.
33	The Universal Institutional Funds, Inc.—U.S. Real Estate Portfolio: Class I.	NVIT—Van Kampen NVIT Real Estate Fund: Class I.
34	The Universal Institutional Funds, Inc.—U.S. Real Estate Portfolio: Class II.	NVIT—Van Kampen NVIT Real Estate Fund: Class II.
35	Van Eck Worldwide Insurance Trust—Worldwide Emerging Markets Fund: Initial Class.	NVIT—Gartmore NVIT Emerging Markets Fund: Class I.
36	Van Eck Worldwide Insurance Trust—Worldwide Emerging Markets Fund: Initial Class.	NVIT—Gartmore NVIT Emerging Markets Fund: Class III.
37	Van Eck Worldwide Insurance Trust—Worldwide Emerging Markets Fund: Class R1.	NVIT—Gartmore NVIT Emerging Markets Fund: Class III.
38	Wells Fargo Advantage Variable Trust—Wells Fargo Advantage VT Discovery Fund.	NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I.

Ref. No.	Existing funds	Replacement funds
39	Wells Fargo Advantage Variable Trust—Wells Fargo Advantage VT Discovery Fund.	NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class II.
40	Wells Fargo Advantage Variable Trust—Wells Fargo Advantage VT Opportunity Fund: Investor Class.	NVIT—NVIT Multi-Manager Mid Cap Value Fund: Class II.

7. All of the Replacement Funds that correspond to the Existing Funds are available as Investment Options in the Contracts.

8. Each Replacement Fund is a series of NVIT, a Delaware statutory trust. NVIT is registered as an open-end management investment company under the 1940 Act and its shares are registered under the Securities Act of 1933, as amended, on Form N–1A (1933 Act File No. 02–73024). NVIT is a series investment company and currently offers 58 separate series (each a ''Fund'' and collectively, the ''Funds''). Shares of NVIT are sold exclusively to insurance company separate accounts to fund benefits under variable annuity contracts and variable life insurance policies, and to employer pension and profit-sharing plans.

9. Nationwide Fund Advisors (''NFA'') is a registered investment adviser (Reg. No. 801–56370) and is an affiliate of Section 26 Applicants. NFA currently serves as investment adviser (''Adviser'') to each of the Funds, including the Replacement Funds, pursuant to investment management agreements between NVIT, on behalf of each Fund, and NFA (the ''Management Agreements''). NFA employs a sub-advised strategy whereby NFA serves as a ''manager of managers'' and delegates the fund management responsibilities for each Fund to one or more third party investment advisors (each a ''Sub-Adviser'') via investment advisory agreements (''Sub-Advisory Agreements'').

Pursuant to the Management Agreements, NFA's responsibilities include general management of each Fund, including full discretion to (i) select a new sub-adviser or an additional Sub-Adviser for each Fund; (ii) terminate a Sub-Adviser for each Fund; (iii) enter into, modify, and terminate Sub-Advisory Agreements; and (iv) allocate and reallocate a Fund's assets among the Adviser and one or more Sub-Advisers. In addition, the Adviser monitors and reports to NVIT's Board of Trustees on the performance of each Sub-Adviser relative to such Sub-Adviser's responsibilities of complying with the investment objectives, policies, and restrictions of any Fund under the management of such Sub-Adviser.

10. NVIT received an exemptive order from the Commission on April 28, 1998 (Investment Company Act Release No. 23133) (the ''Manager of Managers Order'') that permits the Adviser, subject to certain conditions, including approval of the NVIT Board of Trustees, and without the approval of shareholders, to: (i) Select a new Sub-Adviser or additional Sub-Adviser for each Fund; (ii) terminate any existing Sub-Adviser and/or replace the Sub-Adviser; (iii) enter into new Sub-Advisory Agreements [1] and/or materially modify the terms of, or terminate, any existing Sub-Advisory Agreement; and (iv) allocate and reallocate a Fund's assets among the Adviser and one or more Sub-Advisers.

If a new Sub-Adviser is retained for a Fund, Contract Owners would receive all information about the new Sub-Adviser that would be included in a proxy statement, including any change in disclosure caused by the addition of a new Sub-Adviser.

11. Section 26 Applicants represent that, after the Substitution date, the Replacement Funds will not change sub-advisers, retain any new sub-adviser, or otherwise rely on the Manager of Managers Order without first obtaining shareholder approval of: the new sub-adviser, the fund's ability add or to replace a sub-adviser in reliance on the Manager of Managers Order, or otherwise rely on the Manager of Managers Order.

12. The Appendix includes a comparison of the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of each Existing Fund and its corresponding Replacement Fund. The 12b–1 fees listed in the fee tables provided in the Appendix for each Existing Fund and Replacement Fund represents the maximum 12b–1 fee that could be assessed by the particular fund, except with regard to the Franklin Templeton Variable Insurance Products Trust—Templeton Developing Markets Securities Fund: Class 3, which is disclosed in a footnote.

13. Set forth below is a description of the investment objectives, the advisers, the principal investment strategies and principal risk factors of each Existing Fund and its corresponding Replacement Fund.

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[1] Relating to NVIT, the Adviser will not enter into any Sub-Advisory Agreement with any Sub-Adviser that is an ''affiliated person,'' as defined in Section 2(a)(3) of the 1940 Act, of NVIT or the Adviser, other than by reason of serving as a Sub-Adviser to a Fund, without such Sub-Advisory Agreement, including the compensation to be paid thereunder, being approved by the unit holders of any separate account for which that Fund serves as a funding medium.

Existing Fund (Substitution Ref. No.)	Replacement Fund
AIM Variable Insurance Funds – AIM V.I. Basic Value Fund (1 & 2) - Long-term growth of capital.	**NVIT – NVIT Multi-Manager Large Cap Value Fund** - Long-term capital growth
Adviser (Sub-Adviser): AIM Advisors, Inc.	*Adviser (Sub-Adviser):* Nationwide Fund Advisors (Goldman Sachs Asset Management, L.P., Wellington Management Company, LLP, Deutsche Asset Management)
Principal Investment Strategy: The fund seeks to meet this objective by investing, normally, at least 65% of its total assets in equity securities of U.S. issuers that have market capitalizations in excess of $5 billion. In complying with the fund's 65% investment requirement, the fund will invest primarily in marketable equity securities the portfolio managers believe have the potential for capital growth, and its investments may include synthetic and derivative instruments. The fund may also invest up to 25% of its total assets in foreign securities.	*Principal Investment Strategy:* Under normal circumstances, the Fund invests at least 80% of the value of its net assets in equity securities issued by large-cap companies, utilizing a value style of investing. In other words, the Fund seeks companies whose stock price may not reflect the company's value. Equity securities in which the Fund invests are primarily common stock, although they may include other equity securities, such as preferred stock or convertible securities. The Fund may also invest in equity securities of large-cap companies that are located outside the United States, and in derivatives, such as futures, options, swaps and other hybrid financial instruments. The Fund consists of three sleeves, or portions, managed by different subadvisers. NFA is the Fund's investment adviser and selects the Fund's subadvisers and monitors their performance on an ongoing basis.
Additional Investment Information: ▪ Foreign security exposure capped at 25% of assets ▪ Permitted to invest in synthetic securities ▪ As of 9/30/08, no investments in derivatives ▪ As of 9/30/08, 10% of net assets invested in foreign securities	*Additional Investment Information:* ▪ No cap on the amount invested in foreign securities ▪ Permitted to invest in synthetic securities ▪ As of 8/31/08, no investments in derivatives ▪ As of 8/31/08, 8% of net assets invested in foreign securities
Principal Risk: ▪ Market Risk ▪ Value Investing Risk ▪ Equity Securities Risk	*Principal Risk:* ▪ Stock market risk ▪ Value style risk ▪ Derivatives risk

- Foreign Securities Risk
- Derivatives Risk
- Leverage Risk
- Limited Number of Holdings Risk
- Management Risk

AIM Variable Insurance Funds – AIM V.I. Large Cap Growth Fund (3) - Long-term growth of capital

Adviser (Sub-Adviser): AIM Advisors, Inc.

Principal Investment Strategy: The fund seeks to meet its objective by investing, normally, at least 80% of its assets in securities of large-capitalization companies. In complying with this 80% investment requirement, the fund will invest primarily in marketable equity securities, including convertible securities, but its investments may include other securities, such as synthetic instruments. The fund may invest up to 25% of its total assets in foreign securities.

Additional Investment Information:
- Foreign security exposure capped at 25% of assets
- Permitted to invest in synthetic securities
- As of 9/30/08, 9% of net assets invested in foreign securities

Principal Risk:
- Stock market risk
- Foreign securities risk
- Management risk

American Century Variable Portfolios, Inc. – American Century VP Ultra Fund (9 & 10) - Long-term capital growth

Adviser (Sub-Adviser): American Century Investment Management, Inc.

Principal Investment Strategy: The portfolio managers look for stocks of companies they believe will increase in value over time, using investment strategies developed by American Century. Under

- Foreign securities risk
- Multi-manager risk
- Portfolio turnover risk

NVIT – NVIT Multi-Manager Large Cap Growth Fund - Long-term capital growth

Adviser (Sub-Adviser): Nationwide Fund Advisors (Neuberger Berman Management Inc., Goldman Sachs Asset Management, L.P., Wells Capital Management, Inc.)

Principal Investment Strategy: Under normal conditions, the Fund invests at least 80% of the value of its net assets in equity securities issued by large-cap companies, utilizing a growth style of investing. Equity securities in which the Fund invests are primarily common stock, although they may include other equity securities, such as preferred stock or convertible securities. The Fund may also invest in equity securities of large-cap companies that are located outside the United States. The Fund consists of three sleeves, or portions, managed by different subadvisers. NFA is the Fund's investment adviser and selects the Fund's subadvisers and monitors their performance on an ongoing basis.

Additional Investment Information:
- No cap on the amount invested in foreign securities
- Permitted to invest in synthetic securities
- Permitted to invest in preferred stock and convertible securities without limitation
- As of 8/31/08, 5% of net assets invested in foreign securities
- As of 8/31/08, no investments in preferred stock or convertible securities

Principal Risk:
- Stock market risk
- Growth style risk
- Foreign securities risk
- Multi-manager risk
- Portfolio turnover risk

normal market conditions, the fund's portfolio will primarily consist of securities of companies whose earnings or revenues are not only growing, but growing at an accelerating pace. The Fund is permitted to invest in preferred stock or convertible securities.

Additional Investment Information:
- No cap on the amount invested in foreign securities
- Permitted to invest in preferred stock and convertible securities without limitation
- As of 9/30/08, 3% of net assets invested in foreign securities
- As of 9/30/08, no investments in preferred stock or convertible securities

Principal Risk:
- Growth Stocks
- Foreign Securities
- Market Risk
- Price Volatility
- Principal Loss

American Century Variable Portfolios, Inc. – American Century VP Capital Appreciation Fund (4) - Capital growth

Adviser (Sub-Adviser): American Century Investment Management, Inc.

Principal Investment Strategy: The portfolio managers look for stocks of medium-sized and smaller companies they believe will increase in value over time, using an investment strategy developed by American Century.

Additional Investment Information:
- Permitted to invest in foreign securities without limitation
- Permitted to invest in synthetic securities and derivatives without limitation
- As of 9/30/08, 12% of net assets invested in foreign securities
- As of 9/30/08, no investments in derivatives

NVIT – NVIT Multi-Manager Mid Cap Growth Fund - Long-term capital growth

Adviser (Sub-Adviser): Nationwide Fund Advisors (American Century Investment Management Inc., Neuberger Berman Management Inc.)

Principal Investment Strategy: Under normal conditions, the Fund invests at least 80% of the value of its net assets in equity securities issued by mid-cap companies, utilizing a growth style of investing. Equity securities in which the Fund invests are primarily common stock, although they may include other equity securities, such as preferred stock or convertible securities. The Fund may also invest in equity securities of companies that are located outside the United States, and in derivatives, such as futures, options, swaps and other hybrid financial instruments.

The Fund consists of two sleeves, or portions, managed by different subadvisers. NFA is the Fund's investment adviser and selects the Fund's subadvisers and monitors their performance on an ongoing basis.

Additional Investment Information:
- Permitted to invest in foreign securities without limitation
- Permitted to invest in synthetic securities and derivatives without limitation
- Permitted to invest in preferred securities and convertible securities without limitation
- Permitted to invest in emerging markets

Principal Risk:
- Growth Stocks
- Mid cap Stocks
- Foreign securities
- IPO risk
- Market risk
- Price volatility
- Portfolio turnover risk
- Principal loss

American Century Variable Portfolios, Inc. – American Century VP Vista Fund (11, 12, & 13) - Long-term capital growth

Adviser (Sub-Adviser): American Century Investment Management, Inc.

Principal Investment Strategy: The portfolio managers primarily look for stocks of medium-sized and smaller companies they believe will increase in value over time. The portfolio managers' principal analytical technique involves the identification of companies with earnings and revenues that are not only growing, but growing at an accelerating pace.

Additional Investment Information:
- Permitted to invest in foreign securities without limitation
- Permitted to invest in synthetic securities and derivatives without limitation
- Permitted to invest in preferred securities and convertible securities without limitation
- As of 9/30/08, 5% of net assets invested in foreign securities
- As of 9/30/08, no investments in derivatives
- As of 9/30/08, no investments in preferred stock or convertible securities

Principal Risk:
- Growth Stocks
- Mid Cap Stocks
- Foreign Securities
- Market Risk
- Price Volatility
- Portfolio Turnover
- Principal Loss

Neuberger Berman Advisers Management Trust – AMT Growth Portfolio (22) - Growth of capital

securities without limitation
- Permitted to invest in REITs without limitation
- As of 8/31/08, 4% of net assets invested in foreign securities (1% of which was invested in emerging markets securities)
- As of 8/31/08, no investments in derivatives
- As of 8/31/08, no investments in preferred stock or convertible securities
- As of 8/31/08, no investments in REITs

Principal Risk:
- Stock market risk
- Mid-cap risk
- Growth style risk
- Foreign securities risk
- Derivatives risk
- Multi-manager risk.
- Portfolio turnover risk

Adviser (Sub-Adviser): Neuberger Berman Management Inc. (Neuberger Berman, LLC)

Principal Investment Strategy: To pursue this goal, the Fund normally invests in common stocks of mid-capitalization companies. The Portfolio Manager employs a disciplined investment strategy when selecting growth stocks. Using fundamental research and quantitative analysis, the Portfolio Manager looks for fast growing companies with above average sales and competitive returns on equity relative to their peers.

Additional Investment Information:

- Permitted to invest in foreign securities without limitation
- Permitted to invest in synthetic securities and derivatives without limitation
- As of 9/30/08, 2% of net assets invested in foreign securities
- As of 9/30/08, no investments in derivatives

Principal Risk:

- Stock market risk
- Mid cap risk
- Growth stock risk
- Portfolio turnover risk
- Derivatives risk
- Foreign securities risk

Neuberger Berman Advisers Management Trust – AMT Mid-Cap Growth Portfolio (26, 27 & 28) - Growth of capital

Adviser (Sub-Adviser): Neuberger Berman Management Inc. (Neuberger Berman, LLC)

Principal Investment Strategy: Mid-capitalization companies are generally defined as those companies with a total market capitalization within the market capitalization range of the Russell Midcap® Index. The Portfolio Manager employs a disciplined investment strategy when selecting growth stocks. The Fund will not alter its policy of investing at least 80% of its assets in stocks of mid-capitalization companies without providing at least 60 days' prior notice to shareholders.

Additional Investment Information:

- Permitted to invest in foreign securities without limitation
- Permitted to invest in synthetic securities and derivatives without limitation
- Permitted to invest in preferred securities and convertible securities without limitation
- As of 10/31/08, 2% of net assets invested in foreign securities
- As of 10/31/08, no investments in derivatives

Principal Risk:

- Stock market risk
- Mid cap risk
- Growth stock risk
- Portfolio turnover risk
- Derivatives risk
- Foreign securities risk

The Universal Institutional Funds, Inc. – Mid Cap Growth Portfolio (32) - Long-term capital growth by investing primarily in common stocks and other equity securities

Adviser (Sub-Adviser): Morgan Stanley Investment Management Inc., which does business in certain instances as "Van Kampen"

Principal Investment Strategy: The Portfolio invests primarily in growth-oriented equity securities of U.S. mid cap companies and foreign companies, including emerging market securities. The Adviser may invest up to 25% of the Portfolio's net assets in foreign securities, including emerging market securities classified as American Depositary Receipts ("ADRs"), Global Depositary Receipts ("GDRs"), American Depositary Shares ("ADSs") or Global Depositary Shares ("GDSs"), foreign U.S. dollar-denominated securities that are traded on a U.S. exchange or local shares of emerging market countries. The Portfolio may invest up to 10% of its net assets in real estate investment trusts ("REITs").

Additional Investment Information:

- Foreign security exposure capped at 25% of assets
- REITs exposure capped at 10% of assets
- Permitted to invest in emerging markets securities without limitation
- Permitted to invest in synthetic securities and derivatives without limitation
- Permitted to invest in preferred securities and convertible securities without limitation
- As of 9/30/08, 21% of net assets invested in foreign securities
- As of 9/30/08, 15% of net assets invested in emerging markets securities
- As of 9/30/08, no investments in REITs
- As of 9/30/08, no investments in derivatives

Principal Risk:

- Stock market risk
- Mid cap risk
- Growth style risk
- REIT risk
- Foreign securities risk
- Derivatives risk

Wells Fargo Advantage Variable Trust – Wells

Fargo Advantage VT Discovery Fund (38 & 39) - Long-term capital appreciation

Adviser (Sub-Adviser): Wells Fargo Funds Management, LLC (Cooke & Bieler, L.P.)

Principal Investment Strategy: We invest in equity securities of small- and medium-capitalization companies that we believe offer favorable opportunities for growth. We may also invest in equity securities of foreign issuers through ADRs and similar investments. Furthermore, we may use futures, options or swap agreements, as well as other derivatives, to manage risk or to enhance return. We may actively trade portfolio securities.

Additional Investment Information:

- Foreign security exposure capped at 25% of assets
- Permitted to invest in preferred securities and convertible securities without limitation
- As of 7/31/08, no investments in foreign securities
- As of 7/31/08, no investments in derivatives

Principal Risk:

- Active Trading Risk
- Counter-Party Risk
- Derivatives Risk
- Foreign Investment Risk
- Growth Style Investment Risk
- Issuer Risk
- Leverage Risk
- Liquidity Risk
- Management Risk
- Market Risk
- Regulatory Risk
- Smaller Company Securities Risk

American Century Variable Portfolios, Inc. – American Century VP International Fund (5, 6, 7 & 8) - Capital growth

Adviser (Sub-Adviser): American Century Global Investment Management, Inc.

Principal Investment Strategy: The fund invests primarily in securities of companies located in at least three developed countries world-wide (excluding the United States). The portfolio managers look for stocks of companies they believe will increase in value over time. Under normal market conditions, the fund's portfolio will primarily consist of securities of companies whose earnings or revenues are not only growing, but growing at an accelerating pace.

NVIT – NVIT Multi-Manager International Growth Fund - Long-term capital growth

Adviser (Sub-Adviser): Nationwide Fund Advisors (A I M Capital Management, Inc., American Century Global Investment Management Inc.)

Principal Investment Strategy: Under normal conditions, the Fund invests at least 80% of the value of its net assets in equity securities issued by companies that are located in, or that derive a significant portion of their earnings or revenues from, a number of countries around the world other than the United States. Some of these countries may be considered to be emerging market countries. The Fund employs a growth style of investing. The Fund may invest in equity securities of companies of any market capitalization. The Fund also may use derivatives, such as futures and options, for efficient

portfolio management. The Fund consists of two sleeves, or portions, managed by different subadvisers. NFA is the Fund's investment adviser and selects the Fund's subadvisers and monitors their performance on an ongoing basis.

Additional Investment Information:
- Permitted to invest in foreign securities without limitation
- Permitted to invest in derivatives without limitation
- Permitted to invest in emerging markets securities without limitation
- As of 9/30/08, 5% of net assets invested in emerging markets securities
- As of 9/30/08, no investments in derivatives

Principal Risk:
- Growth Stocks
- Mid cap Stocks
- Foreign securities
- IPO risk
- Market risk
- Price volatility
- Portfolio turnover risk
- Principal loss

Additional Investment Information:
- Permitted to invest at least 80% of net assets in foreign securities
- Permitted to invest in derivatives without limitation
- Permitted to invest in emerging markets securities without limitation
- As of 8/31/08, 10% of net assets invested in emerging markets securities
- As of 8/31/08, no investments in derivatives

Principal Risk:
- Stock market risk
- Mid-cap risk
- Growth style risk
- Foreign securities risk
- Derivatives risk
- Multi-manager risk.
- Portfolio turnover risk

Credit Suisse Trust – International Flex I Portfolio (formerly, International Focus Portfolio) (14 & 15) - Long-term capital appreciation

Adviser (Sub-Adviser): Credit Suisse Asset Management, LLC (Credit Suisse Asset Management Limited)

Principal Investment Strategy: Invests at least 80% of its net assets, plus any borrowings for investment purposes, in equity securities of 60 to 85 foreign companies. Focuses on the world's major foreign markets. Limited emerging-markets investments. Favors stocks with discounted valuations, using a value-based, bottom-up investment approach. The portfolio may invest up to 15% of its net assets in emerging markets.

Additional Investment Information:
- Permitted to invest at least 80% of net assets in foreign securities
- Permitted to invest up to 15% of net assets in

NVIT – Gartmore NVIT International Equity Fund - Long-term capital growth by investing primarily in equity securities of companies located in Europe, Australasia, the Far East and other regions, including developing countries.

Adviser (Sub-Adviser): Nationwide Fund Advisors (Gartmore Global Partners)

Principal Investment Strategy: Under normal circumstances, the Fund invests at least 80% of the value of its net assets in equity securities issued by companies of any size, including small- and mid-cap companies, that are located in, or that derive a significant portion of their earnings or revenues from, a number of countries around the world other than the United States. Some of these countries may be considered to be emerging market countries. The Fund employs a growth style of investing. The Fund also may use derivatives, such as futures and options. The Fund may engage in active and frequent trading of portfolio securities.

NFA has selected Gartmore Global Partners as subadviser to manage the Fund's portfolio on a day-to-day basis.

Additional Investment Information:
- Permitted to invest at least 80% of net assets in foreign securities
- Permitted to invest in emerging markets

emerging markets securities
- Permitted to invest in small and mid cap companies without limitation
- Permitted to invest in derivatives without limitation
- As of 10/31/08, 3% of net assets invested in emerging markets securities
- As of 10/31/08, 5% of net assets invested in small cap companies and 7% of net assets invested in mid cap companies
- As of 10/31/08, no investments in derivatives

Principal Risk:
- Focus Risk
- Foreign Securities Risk
- Currency Risk
- Information Risk
- Political Risk
- Market Risk

Neuberger Berman Advisers Management Trust – AMT International Portfolio (24 & 25) - Long-term growth of capital by investing primarily in common stocks of foreign companies

Adviser (Sub-Adviser): Neuberger Berman Management Inc. (Neuberger Berman, LLC)

Principal Investment Strategy: To pursue this goal, the Fund invests mainly in foreign companies of any size, including companies in developed and emerging industrialized markets. In picking stocks, the Portfolio Managers look for well-managed and profitable companies that show growth potential and whose stock prices are undervalued.

Additional Investment Information:
- Seeks to mainly invest in foreign securities
- Permitted to invest in emerging markets securities without limitation
- Permitted to invest in derivatives without limitation
- As of 10/31/08, no investments in derivatives

Principal Risk:
- Stock market risk
- Foreign securities risk
- Emerging market risk
- Mid cap and small cap risk
- Value style risk
- Growth style risk
- Derivatives risk

Federated Insurance Series – Federated Quality Bond Fund II (16 & 17) - Current income

Adviser (Sub-Adviser): Federated Investment Management Company

securities without limitation
- Permitted to invest in derivatives without limitation
- As of 10/31/08, 3% of net assets invested in emerging markets securities
- As of 10/31/08, no investments in small cap companies and 3% of net assets invested in mid cap companies
- As of 10/31/08, no investments in derivatives

Principal Risk:
- Stock market risk
- Foreign securities risk
- Emerging markets risk
- Small- and mid-cap securities risk
- Derivatives risk
- Growth style risk
- Portfolio turnover

NVIT – NVIT Core Bond Fund - High level of current income consistent with preserving capital

Adviser (Sub-Adviser): Nationwide Fund Advisors (Nationwide Asset Management, LLC)

Principal Investment Strategy: The Fund invests in a diversified portfolio of investment -grade, fixed-income securities consisting primarily of corporate debt securities, U.S. government and privately issued mortgage-backed securities, and U.S. Treasury and agency securities. Some of the corporate debt securities in which the Fund invests are considered to be foreign securities. The foreign securities in which the Fund invests will be predominately denominated in U.S. dollars. The Fund may invest in derivative contracts to implement its investment strategies. The Fund intends to invest in the securities of U.S. government-sponsored entities (GSEs), including GSE securities that are not backed by the full faith and credit of the U.S. government, such as those issued by the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, and the Federal Home Loan Bank System. The Fund may also invest in GSE securities that are supported by the full faith and credit of the U.S. government, such as those issued by the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, and the Federal Home Loan Bank System. Finally, the Fund may invest in a few GSE securities that have no explicit financial support, but which are regarded as having implied support because the federal government sponsors their activities. Such securities include those issued by the Farm Credit System and the Financing Corporation.

Additional Investment Information:

- Permitted to invest in derivatives, preferred stock, high yield securities or foreign securities without limitation
- As of 9/30/08, no investments in derivatives, preferred stock or foreign securities
- As of 9/30/08, 2% of net assets invested in high yield securities

Principal Risk:

- Interest Rate Risk
- Credit Risks
- Call and Prepayment Risks
- Risks of Foreign Investing
- Liquidity Risk
- Leverage Risks
- Risks Associated with Complex CMOs
- Risks of Investing in Derivative Contracts and Hybrid Instruments

Franklin Templeton Variable Insurance Products Trust – Templeton Developing Markets Securities Fund (18 & 19) - Long-term capital appreciation

Principal Investment Strategy: Under normal circumstances, the Fund invests at least 80% of the value of its net assets in fixed-income securities that are investment grade, including corporate bonds, U.S. government securities and U.S. government agency securities. The Fund may also invest a portion of its assets in:

* mortgage-backed securities;

* asset-backed securities;

* bank and corporate loans;

* foreign government and corporate bonds denominated in U.S. dollars;

* commercial paper rated by a rating agency in one of the two highest rating categories;

* high-yield bonds (i.e., "junk bonds");

* preferred stock and

* derivatives.

*NFA has selected Nationwide Asset Management, LLC as subadviser to manage the Fund's portfolio on a day-to-day basis.

Additional Investment Information:

- Permitted to invest in derivatives, preferred stock, high yield securities or foreign securities without limitation
- As of 10/31/08, no investments in derivatives, preferred stock, high yield or foreign securities

Principal Risk:

- Interest rate risk
- Credit risk
- Liquidity risk
- Prepayment, call and redemption risk
- Extension risk
- Mortgage- and asset-backed securities risk
- Lower rated securities risk
- Event risk
- Bank and corporate loans risk

NVIT – Gartmore NVIT Emerging Markets Fund - Long-term capital growth by investing primarily in equity securities of companies located in emerging market countries

Adviser (Sub-Adviser): Templeton Asset Management Ltd.

Principal Investment Strategy: Under normal market conditions, the Fund invests at least 80% of its net assets in emerging market investments. Under normal market conditions, the Fund invests primarily to predominantly in equity securities. In addition to its main investments, the Fund may invest up to 20% of its net assets in investments of developed market countries. The Fund also may invest in American, Global and European Depositary Receipts. The Fund may invest up to 15% of its net assets in illiquid securities. The Fund may also invest a small portion of its total assets in shares of exchange-traded funds to gain exposure to the equity market while maintaining liquidity.

Additional Investment Information:
- Permitted to invest up to 15% of net assets in illiquid securities
- Permitted to invest in derivatives without limitation
- As of 6/30/08, no investments in derivatives

Principal Risk:
- Stock market risk
- Value style investing
- Foreign securities
- Currency exchange rates
- Political and economic developments
- Trading practices
- Availability of information
- Limited markets
- Emerging markets

Neuberger Berman Advisers Management Trust – AMT Regency Portfolio (30) - Growth of capital

Adviser (Sub-Adviser): Neuberger Berman Management Inc. (Neuberger Berman, LLC)

Principal Investment Strategy: To pursue this goal, the Fund invests mainly in common stocks of mid-capitalization companies. The Portfolio Manager looks for undervalued companies with high-quality businesses. While the Fund invests primarily in domestic stocks, it may also invest in stocks of foreign companies.

Adviser (Sub-Adviser): Nationwide Fund Advisors (Gartmore Global Partners)

Principal Investment Strategy: Under normal circumstances, the Fund invests at least 80% of the value of its net assets in equity securities issued by companies that are located in, or that derive a significant portion of their earnings or revenues from, emerging market countries. The Fund may invest in companies of any size, including small- and mid-cap companies. The Fund also may use derivatives, such as futures and options. The Fund may engage in active and frequent trading of portfolio securities.

NFA has selected Gartmore Global Partners as subadviser to manage the Fund's portfolio on a day-to-day basis.

Additional Investment Information:
- Permitted to invest in illiquid securities without limitation
- Permitted to invest in derivatives without limitation
- As of 10/31/08, 2% of net assets invested in illiquid securities
- As of 10/31/08, no investments in derivatives

Principal Risk:
- Foreign securities risk
- Emerging markets risk
- Stock market risk
- Small- and mid-cap securities risk
- Derivatives risk
- Portfolio turnover

NVIT – NVIT Multi-Manager Mid Cap Value Fund - Long term capital appreciation

Adviser (Sub-Adviser): Nationwide Fund Advisors (American Century Investment Management, Inc., RiverSource Investments, LLC, Thompson, Siegel & Walmsley LLC)

Principal Investment Strategy: Under normal conditions, the Fund invests at least 80% of the value of its net assets in equity securities issued by mid-cap companies, utilizing a value style of investing. Equity securities in which the Fund invests are primarily common stock, although they may include other equity securities, such as preferred stock or convertible securities. The Fund may also invest in equity securities of companies that are located outside the United States, and in derivatives, such as futures, options, swaps and other hybrid financial instruments. The Fund

Additional Investment Information:
- Permitted to invest in foreign securities, preferred securities, and convertible securities without limitation
- As of 10/31/08, no investments in derivatives

Principal Risk:
- Stock market risk
- Mid cap risk
- Value style investing
- Concentration risk
- Foreign securities risk
- Portfolio turnover risk
- Derivatives risk

Wells Fargo Advantage Variable Trust – Wells Fargo Advantage VT Opportunity Fund (40) - Long-term capital appreciation

Adviser (Sub-Adviser): Wells Fargo Funds Management, LLC (Cooke & Bieler, L.P.)

Principal Investment Strategy: We invest in principally equity securities of medium-capitalization companies. We may use futures, options or swap agreements, as well as other derivatives, to manage risk or to enhance return. We reserve the right to hedge the portfolio's foreign currency exposure by purchasing or selling currency futures and foreign currency forward contracts. However, under normal circumstances, we will not engage in extensive foreign currency hedging.

We invest in equity securities of medium-capitalization companies that we believe are under-priced yet have attractive growth prospects.

Additional Investment Information:
- Permitted to invest up to 25% in foreign securities
- Permitted to invest in preferred securities, and convertible securities without limitation
- As of 7/31/08, 6% of net assets invested in foreign securities
- As of 7/31/08, no investments in derivatives

Principal Risk:
- Counter-Party Risk
- Currency Hedging Risk

consists of three sleeves, or portions, managed by different subadvisers. NFA is the Fund's investment adviser and selects the Fund's subadvisers and monitors their performance on an ongoing basis.

Additional Investment Information:
- Permitted to invest in foreign securities, derivatives, preferred securities, convertible securities, and REITs without limitation
- As of 8/31/08, 3% of net assets invested in foreign securities
- As of 8/31/08, no investments in derivatives, preferred stock, REITs or convertible securities

Principal Risk:
- Stock market risk
- Mid-cap risk
- Value style risk
- Sector risk
- Foreign securities risk
- Derivatives risk
- Multi-manager risk
- Portfolio turnover risk

- Derivatives Risk
- Foreign Investment Risk
- Issuer Risk
- Leverage Risk
- Liquidity Risk
- Management Risk
- Market Risk
- Regulatory Risk
- Smaller Company Securities Risk

Janus Aspen Series – INTECH Risk-Managed Core Portfolio (20 & 21) - Long-term growth of capital

Adviser (Sub-Adviser): Janus Capital Management LLC

Principal Investment Strategy: The Portfolio invests primarily in common stocks from the universe of the Portfolio's benchmark index, which is the S&P 500® Index. Stocks are selected for their potential contribution to the long-term growth of capital, utilizing INTECH's mathematical investment process. INTECH's mathematical investment process seeks to create a portfolio that, over time, produces returns in excess of its benchmark with an equal or lesser amount of risk.

Additional Investment Information:

- Permitted to invest in foreign securities without limitation
- As of 6/30/08, 83% of net assets invested in large cap securities; 16% in mid cap; less than 1% in small cap
- As of 6/30/08, no investments in derivatives, emerging markets, high yield, REITs, preferred stock or convertible securities

Principal Risk:

- Market Risk
- Investment Process Risk
- Portfolio Turnover Risk
- Securities Lending Risk
- Derivatives Risk

Neuberger Berman Advisers Management Trust – AMT Guardian Portfolio (23) - Long-term growth of capital; current income is a secondary goal

NVIT – NVIT Nationwide Fund - Total return through a flexible combination of capital appreciation and current income

Adviser (Sub-Adviser): Nationwide Fund Advisors (Aberdeen Asset Management Inc.)

Principal Investment Strategy: The Fund invests primarily in common stocks and other equity securities, using a multi-disciplined approach which blends fundamental and quantitative investment techniques. The Fund is composed of two sleeves, or portions: a fundamentally managed core equity sleeve and a quantitative managed core equity sleeve. The portfolio managers integrate these sleeves to produce an overall core equity style, which they may opportunistically "tilt" slightly either in the direction of a growth style or a value style, depending on market circumstances.

The Fund may engage in active and frequent trading of portfolio securities. NFA has selected Aberdeen Asset Management Inc. ("Aberdeen") as subadviser to manage the Fund's portfolio on a day-to-day basis.

Additional Investment Information:

- Permitted to invest in foreign securities without limitation
- As of 8/31/08, 73% of net assets invested in large cap securities; 24% in mid cap; 3% in small cap
- As of 8/31/08, 4% of net assets invested in foreign securities
- As of 8/31/08, no investments in derivatives, emerging markets, high yield, REITs, preferred stock or convertible securities

Principal Risk:

- Stock market risk
- Growth style risk
- Value style risk
- Portfolio turnover

NVIT – Neuberger Berman NVIT Multi Cap Opportunities Fund - Long-term capital growth

Adviser (Sub-Adviser): Neuberger Berman Management Inc. (Neuberger Berman, LLC)

Principal Investment Strategy: To pursue these goals, the Fund invests mainly in common stocks of mid- to large-capitalization companies. The Fund seeks to reduce risk by investing across many different industries. The Portfolio Managers employ a research driven and valuation sensitive approach to stock selection. They seek to identify stocks in well-positioned businesses that they believe are undervalued in the market.

Additional Investment Information:

- Permitted to invest in foreign securities, preferred securities, and convertible securities without limitation
- As of 10/31/08, 17% of net assets in foreign securities
- As of 10/31/08, no investments in derivatives, preferred stock or convertible securities

Principal Risk:

- Stock market risk
- Mid cap risk
- Value style risk
- Derivatives risk
- Foreign securities risk

Neuberger Berman Advisers Management Trust – AMT Partners Portfolio (29) - Growth of capital

Adviser (Sub-Adviser): Neuberger Berman Management Inc. (Neuberger Berman, LLC)

Principal Investment Strategy: The Fund invests mainly in common stocks of mid- to large-capitalization companies. The Fund seeks to reduce risk by diversifying among many companies and industries. The Portfolio Manager looks for well-managed companies with strong balance sheets whose stock prices are undervalued. While the Fund invests primarily in domestic stocks, it may also invest in stocks of foreign companies.

Additional Investment Information:

- Permitted to invest in foreign securities and derivatives without limitation
- As of 10/31/08, 20% of net assets in foreign securities
- As of 10/31/08, no investments in derivatives

Adviser (Sub-Adviser): Nationwide Fund Advisors (Neuberger Berman Management Inc.)

Principal Investment Strategy: Under normal conditions, the Fund invests primarily in equity securities issued by mid- to large-cap companies that, in the opinion of the subadviser, exhibit characteristics that are consistent with a value style of investing. Equity securities in which the Fund invests are primarily common stock, although they may include other equity securities, such as preferred stock or convertible securities. The Fund may also invest in equity securities of companies that are located outside the United States. The Fund seeks to reduce risk by diversifying among many companies and industries, and in derivatives, such as futures, options, swaps and other hybrid financial instruments.

Additional Investment Information:

- Permitted to invest in foreign securities, preferred securities, and convertible securities without limitation
- As of 10/31/08, 17% of net assets in foreign securities
- As of 10/31/08, no investments in derivatives, preferred stock or convertible securities

Principal Risk:

- Stock market risk
- Mid-cap risk
- Value style risk
- Foreign securities risk
- Derivatives risk
- Portfolio turnover risk

Principal Risk:
- Stock market risk
- Mid cap risk
- Value style risk
- Foreign securities risk
- Portfolio turnover risk
- Derivatives risk

T. Rowe Price Equity Series, Inc. – T. Rowe Price Limited Term Bond Portfolio (31) - High level of income

Adviser (Sub-Adviser): T. Rowe Price

Principal Investment Strategy: Normally, the fund invests at least 80% of its net assets in bonds and 65% of total assets in short- and intermediate-term bonds. At least 90% of the fund's portfolio will consist of investment-grade securities that have been rated in the four highest credit categories (AAA, AA, A, BBB, or equivalent) by at least one nationally recognized credit rating agency or, if unrated, deemed to be of comparable quality by T. Rowe Price. In an effort to enhance yield, up to 10% of assets can be invested in below investment-grade securities, commonly referred to as "junk" bonds, including those with the lowest rating. The fund's holdings may include mortgage-backed securities, derivatives, and foreign investments.

Additional Investment Information:
- As of 9/30/08, 35% of net assets in mortgage-backed securities; 8% in asset-backed securities
- As of 9/30/08, no investments in derivatives

Principal Risk:
- Interest rate risk
- Credit risk
- Prepayment risk and extension risk
- Liquidity risk
- Foreign investing risk

The Universal Institutional Funds, Inc. – U.S. Real Estate Portfolio (33 & 34) - Above average current income and long-term capital appreciation by investing primarily in equity securities of companies in the U.S. real estate industry, including real estate investment trusts.

Adviser (Sub-Adviser): Morgan Stanley Investment Management Inc., which does business in certain instances as "Van Kampen".

NVIT – NVIT Short Term Bond Fund - High level of current income while preserving capital and minimizing fluctuations in share value

Adviser (Sub-Adviser): Nationwide Fund Advisors (Nationwide Asset Management, LLC)

Principal Investment Strategy: Under normal circumstances, the Fund invests primarily in U.S. government securities, U.S. government agency securities, commercial paper and corporate bonds that are investment grade. The Fund also may purchase mortgage-backed securities and asset-backed securities, and may invest in fixed-income securities that pay interest on either a fixed-rate or variable-rate basis. Up to 10% of the value of the Fund's net assets also may be invested in high-yield bonds. NFA has selected Nationwide Asset Management, LLC as subadviser to manage the Fund's portfolio on a day-to-day basis.

Additional Investment Information:
- As of 8/31/08, 35% of net assets in mortgage-backed securities; 2% in asset-backed securities
- As of 8/31/08, no investments in derivatives

Principal Risk:
- Interest rate risk
- Credit risk
- Liquidity risk
- Prepayment, call and redemption risk
- Extension risk
- Mortgage- and asset-backed securities risk
- Lower rated securities risk
- Bank and corporate loans risk
- Preferred stock risk
- Derivatives risk

NVIT – Van Kampen NVIT Real Estate Fund - Current income and long-term capital appreciation

Adviser (Sub-Adviser): Nationwide Fund Advisors (Van Kampen Asset Management)

Principal Investment Strategy: The Adviser seeks a combination of above average current income and long-term capital appreciation by investing primarily in equity securities of companies in the U.S. real estate industry, including real estate investment trusts ("REITs"). The Portfolio focuses on REITs as well as real estate operating companies ("REOCs") that invest in a variety of property types and regions. Under normal circumstances, at least 80% of the Portfolio's assets will be invested in equity securities of companies in the U.S. real estate industry.

Additional Investment Information:

- Permitted to invest in preferred securities and convertible securities

Principal Risk:

- Stock market risk
- REIT and real estate risk
- Sector risk
- Nondiversified fund risk

Van Eck Worldwide Insurance Trust – Worldwide Emerging Markets Fund (35, 36 & 37) - Long-term capital appreciation

Adviser (Sub-Adviser): Van Eck Associates Corporation

Principal Investment Strategy: Under normal conditions, the Fund will invest at least 80% of its assets in securities of companies that are organized in or maintain at least 50% of their assets in, or that derive at least 50% of their revenues from, emerging market countries. Utilizing qualitative and quantitative measures, the Fund's portfolio manager selects companies that have growth potential within their market niche, specifically focusing on small to mid cap names. The Fund may also invest in derivatives, including future contracts, forward contracts, options, swaps, structured notes and other similar securities, and in collateralized mortgage obligations (CMOs) and other mortgage and non-mortgage asset-backed securities. The Fund generally emphasizes investments in equity securities, but may also invest in debt securities of any quality, as long as not more than 20% of its assets are held in debt securities rated below investment grade ("junk bonds").

Additional Investment Information:

- Permitted to invest in derivatives and mortgage-backed securities without limitation

Principal Investment Strategy: Under normal circumstances, the Fund invests at least 80% of the value of its net assets in equity securities of U.S. real estate companies. These include the securities of real estate investment trusts ("REITs") and real estate operating companies that invest in a variety of property types and regions. Equity securities in which the Fund may invest include common stocks, but may also include preferred stocks and convertible securities. The Fund is nondiversified.

NFA has selected Van Kampen Asset Management as subadviser to manage the Fund's portfolio on a day-to-day basis.

Additional Investment Information:

- Permitted to invest in preferred securities and convertible securities

Principal Risk:

- Stock market risk
- REIT and real estate risk
- Liquidity risk
- Sector risk
- Nondiversified fund risk

NVIT – Gartmore NVIT Emerging Markets Fund - Long-term capital growth by investing primarily in equity securities of companies located in emerging market countries

Adviser (Sub-Adviser): Nationwide Fund Advisors (Gartmore Global Partners)

Principal Investment Strategy: Under normal circumstances, the Fund invests at least 80% of the value of its net assets in equity securities issued by companies that are located in, or that derive a significant portion of their earnings or revenues from, emerging market countries. The Fund emphasizes companies that the subadviser believes have the potential to deliver unexpected earnings. The Fund may invest in companies of any size, including small- and mid-cap companies. The Fund also may use derivatives, such as futures and options, either as a substitute for taking a position in an underlying asset, to increase returns or as part of a hedging strategy. The Fund may engage in active and frequent trading of portfolio securities. NFA has selected Gartmore Global Partners as subadviser to manage the Fund's portfolio on a day-to-day basis.

Additional Investment Information:

- Permitted to invest in derivatives and mortgage-backed securities without limitation

- As of 9/30/08, less than 1% of net assets in derivative securities
- As of 9/30/08, no investments in mortgage-backed securities

Principal Risk:

- Stock market risk
- Emerging market risk
- Foreign securities risk
- Inflation risk
- Derivatives risk
- Credit risk
- Interest rate risk
- Debt securities rated below investment grade risk
- Small or mid cap risk
- Non-diversified fund risk
- Leverage risk

- As of 8/31/08, no investments in mortgage-backed securities or derivatives

Principal Risk:

- Foreign securities risk
- Emerging markets risk
- Stock market risk
- Small- and mid-cap securities risk Derivatives risk
- Non-diversified fund risk
- Portfolio turnover risk

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14. As a result of the Substitutions, the number of Investment Options under each Contract will either not be decreased, or, in those cases where the number of Investment Options is being reduced, continue to offer a significant number of alternative Investment Options. Specifically, the number of Investment Options is currently expected to range in number from 21 to 129 after the Substitutions versus 23 to 149 before the Substitutions.

15. Prospectus supplements for the Contracts will be delivered to Contract Owners at least thirty (30) days before the Substitution date. The supplements will: (i) Notify all Contract Owners of the Insurance Company Applicants' intent to implement the Substitutions, and that an application has been filed in order to obtain the necessary orders to do so; (ii) advise Contract Owners that from the date of the supplement until the Substitution date, Contract Owners are permitted to transfer Contract value out of any Existing Fund sub-account to any other sub-account(s) offered under the Contract without the transfer being treated as a transfer for purposes of transfer limitations and short-term trading fees that would otherwise be applicable under the terms of the Contract; (iii) instruct Contract Owners how to submit transfer requests in light of the proposed Substitutions; (iv) advise Contract Owners that any Contract value remaining in an Existing Fund sub-account on the Substitution date will be transferred to the corresponding Replacement Fund sub-account, and that the Substitutions will take place at relative net asset value; (v) inform Contract Owners that for at least thirty (30) days following the Substitution date, the Insurance Company Applicants will permit Contract Owners to make transfers of Contract value out of each Replacement Fund sub-account to any other sub-account(s) offered under the Contract without the transfer being treated as a transfer for purposes of transfer limitations and short-term trading fees that would otherwise be applicable under the terms of the Contract; and (vi) inform Contract Owners that the respective Insurance Company Applicant will not exercise any rights reserved by it under the Contracts to impose additional restrictions on transfers out of a Replacement Fund for at least thirty (30) days after the Substitution date.[2]

16. The Insurance Company Applicants will cause the appropriate prospectus supplements containing this disclosure and the prospectus and/or supplement for the Replacement Funds to be sent to all existing Contract Owners. New purchasers of the Contracts will be provided the prospectus supplement, the Contract prospectus, and the prospectus and/or supplement for the Replacement Funds in accordance with all applicable legal requirements. Prospective purchasers of the Contracts will be provided the prospectus supplement and the Contract prospectus.

17. In addition to the Contract prospectus supplements distributed to Contract Owners, within five (5) business days after the Substitution date, Contract Owners will be sent a confirmation of the Substitutions in accordance with Rule 10b–10 under the Securities Exchange Act of 1934, as amended. The confirmation statement will reiterate that the Insurance Company Applicant will not exercise any right reserved by it under the Contracts to impose any restrictions or fees on transfers from the Replacement Funds until at least thirty (30) days after the Substitution date.

18. The proposed Substitutions will take place at relative net asset value determined on the Substitution date pursuant to Section 22 of the 1940 Act and Rule 22c–1 thereunder with no change in the amount of any Contract Owner's Contract value, cash value, death benefit, or dollar value of his or her investment in the Separate Accounts. Each Substitution will be effected by redeeming shares of the Existing Fund in cash and/or in-kind on the Substitution date at their net asset value and using the proceeds of those redemptions to purchase shares of the Replacement Fund at their net asset value on the same date.[3]

19. Contract Owners will not incur any fees or charges as a result of the proposed Substitutions, nor will their rights or insurance benefits or the Insurance Company Applicants' obligations under the Contracts be altered in any way. All expenses incurred in connection with the proposed Substitutions, including any brokerage, legal, accounting, and other fees and expenses, will be paid by the Insurance Company Applicants. In addition, the proposed Substitutions will not impose any tax liability on Contract Owners. The proposed

[2] One exception to this is that the Insurance Companies may impose restrictions on transfers to the extent necessary to prevent or limit disruptive trading activity, as described in the prospectuses for the Contracts and the underlying mutual funds.

[3] For administrative convenience, the In-Kind Transactions may be effected through a direct transfer of securities and cash between the custodian(s) for the Existing Fund and its corresponding Replacement Fund, followed by the distribution of shares of the Replacement Fund to the applicable Separate Account(s).

Substitutions will not cause the Contract fees and charges currently being paid by Contract Owners to be greater after the proposed Substitution than before the proposed Substitution. No fees will be charged on transfers made on the Substitution date because each Substitution redemption and purchase will not be treated as a transfer for purposes of assessing transfer charges or computing the number of permissible transfers under the Contracts.

20. For all Substitutions other than Janus Aspen Series—INTECH Risk-Managed Core Portfolio: Service Shares to be replaced by NVIT—NVIT Nationwide Fund: Class II (Ref. No. 21) (the ''Aspen Substitution''), for a period of two (2) years following the Substitution date and for those Contracts with assets allocated to the Existing Fund on the date of the Substitution, the issuing Insurance Company, as applicable, will reimburse, on the last business day of each fiscal quarter, the sub-accounts investing in the applicable Replacement Fund to the extent that the Replacement Fund's net annual expenses for such period exceeds, on an annualized basis, the net annual expenses of the Existing Fund for fiscal year 2008. In addition, the Insurance Company Applicants will not increase the Contract fees and charges that would otherwise be assessed under the terms of the Contracts for a period of at least two (2) years following the Substitution date.

21. For the Aspen Substitution, where the sum of the management fee and 12b–1 fee of the Replacement Fund is greater than (or could be greater than) that of the Existing Fund, for those Contracts with assets allocated to the Existing Fund on the date of the Substitution, the issuing Insurance Company Applicant, as applicable, will reimburse, on the last business day of each fiscal quarter, the sub-accounts investing in the applicable Replacement Fund to the extent that the Replacement Fund's net annual expenses for such period exceeds, on an annualized basis, the net annual expenses of the Existing Fund for fiscal year 2008. In addition, for those same Contracts, the Insurance Company Applicants will not increase the Contract fees and charges that would otherwise be assessed under the terms of the Contracts for the duration of the Contracts.

Section 26 Applicants' Legal Analysis

1. Section 26 Applicants request that the Commission issue an order pursuant to Section 26(c) of the 1940 Act approving the proposed Substitutions.

2. Section 26 Applicants assert that Section 26(c) of the 1940 Act makes it unlawful for the depositor of a registered unit investment trust that invests in the securities of a single issuer to substitute another security for such security without Commission approval. Section 26(c) further states that the Commission shall issue an order approving such a substitution ''if the evidence establishes that it is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title.''

3. Section 26 Applicants represent that the Contracts have reserved the right to substitute shares of another underlying mutual fund for one of the current underlying mutual funds offered as an investment option under the Contracts. The Contract prospectuses disclose this right.

4. Section 26 Applicants represent that each Replacement Fund and its corresponding Existing Fund have similar, and in some cases substantially similar or identical, investment objectives and strategies. In addition, Section 26 Applicants maintain that each proposed Substitution retains for Contract Owners the investment flexibility and expertise in asset management, which are core investment features of the Contracts and any impact on the investment programs of affected Contract Owners should be negligible.

Furthermore, Section 26 Applicants assert that the ultimate effect of the Substitutions would be to continue to provide Contract Owners with a wide array of investment options and managers, while at the same time increasing administrative efficiencies of the Contracts. Additionally, Section 26 Applicants claim that information pertaining to the underlying mutual funds available under the Contracts will be more consistent and thus easier for Contract Owners to navigate and understand.

5. Section 26 Applicants represent that after the Substitution date, Contract Owners with Contract value invested in a Replacement Fund will have the same or lower net operating expense ratio(s) as before the Substitution. As indicated previously, certain expense limits have been put in place to ensure that Contract Owners do not incur higher expenses as a result of a Substitution for a period of either two (2) years after the Substitution, or for the lifetime of the Contract.

6. Section 26 Applicants submit that the proposed Substitutions are not of the type that Section 26 was designed to prevent, *i.e.,* overreaching on the part of the depositor by permanently impacting the investment allocations of the entire trust. In the current situation, the Contracts provide Contract Owners with investment discretion to allocate and reallocate their Contract value among the available underlying mutual funds. Section 26 Applicants claim this flexibility provides Contract Owners with the ability to reallocate their assets at any time—either before the Substitution date, or after the Substitution date—if they do not wish to invest in the Replacement Fund. Thus, Section 26 Applicants assert that the likelihood of being invested in an undesired underlying mutual fund is minimized, with the discretion remaining with the Contract Owners, and the Substitutions, therefore, will not result in the type of costly forced redemption that Section 26(c) was designed to prevent.

7. Section 26 Applicants submit that the proposed Substitutions are also unlike the type of substitution that Section 26(c) was designed to prevent in that the Substitutions have no impact on other aspects of the Contracts. Specifically, Section 26 Applicants maintain that the type of insurance coverage offered by the Insurance Company Applicants under the applicable Contract, as well as numerous other rights and privileges associated with the Contract, are not impacted by the proposed Substitution. Section 26 Applicants note that Contract Owners also may have considered the Insurance Company Applicant's size, financial condition, and its reputation for service in selecting their Contract. Section 26 Applicants assert that these factors will not change as a result of the proposed Substitutions, nor will the annuity, life, or tax benefits afforded under the Contracts held by any of the affected Contract Owners.

8. Section 26 Applicants submit that, for all the reasons stated above, the proposed Substitutions are consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

Section 17 Applicants' Legal Analysis

1. Section 17 Applicants request that the Commission issue an order pursuant to Section 17(b) of the 1940 Act exempting them from the provisions of Section 17(a) of the 1940 Act to the extent necessary to permit them to carry out the In-Kind Transactions.

2. Section 17(a)(1) of the 1940 Act, in relevant part, generally prohibits any affiliated person of a registered investment company (or any affiliated person of such a person), acting as principal, from knowingly selling any security or other property to that

company. Section 17(a)(2) of the 1940 Act generally prohibits the same persons, acting as principals, from knowingly purchasing any security or other property from the registered investment company. Section 2(a)(3) of the 1940 Act defines the term ''affiliated person'' of another person, in relevant part, as:

(A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; [or] (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person* * *

3. Section 2(a)(9) of the 1940 Act states that any person who owns beneficially, either directly or through one or more controlled companies, more than 25% of the voting securities of a company shall be presumed to control such company. Shares held by an insurance company separate account are legally owned by the insurance company. Thus, the Insurance Company Applicants collectively own substantially all of the shares of NVIT. Accordingly, NVIT and its respective funds are arguably under the control of the Insurance Company Applicants, as per Section 2(a)(9) of the 1940 Act (notwithstanding the fact that the Contract Owners are the beneficial owners of those Separate Account shares). If NVIT is under the common control of the Insurance Company Applicants, then each of the Insurance Company Applicants is an affiliated person of NVIT and its respective Funds. If NVIT and its respective Funds are under the control of the Insurance Company Applicants, then NVIT and its respective affiliates are affiliated persons of the Insurance Company Applicants. Regardless of whether or not the Insurance Company Applicants can be considered to actually control NVIT and its Funds, because the Insurance Company Applicants and their affiliates own of record more than 5% of the shares of each Fund and are under common control with NFA, the Insurance Company Applicants are affiliated persons of NVIT and its Funds. Likewise, NVIT and its respective Funds are each an affiliated person of the Insurance Company Applicants.

4. Section 17 Applicants represent that the proposed In-Kind Transactions could be seen as the indirect purchase of shares of certain Replacement Funds with portfolio securities of certain Existing Funds and the indirect sale of portfolio securities of certain Existing Funds for shares of certain Replacement Funds. Pursuant to this analysis, the proposed In-Kind Transactions also could be categorized as a purchase of shares of certain Replacement Funds by certain Existing Funds, acting as principal, and a sale of portfolio securities by certain Existing Funds, acting as principal, to certain Replacement Funds. In addition, the proposed In-Kind Transactions could be viewed as a purchase of securities from certain Existing Funds, and a sale of securities to certain Replacement Funds, by the Insurance Company Applicants (or their Separate Accounts), acting as principal. If categorized in this manner, the proposed In-Kind Transactions may be deemed to contravene Section 17(a) due to the affiliated status of these participants.

5. Section 17(b) of the 1940 Act provides that any person may apply to the Commission for an exemption from the provisions of Section 17(a), and the Commission shall issue such exemptive order, if evidence establishes that:

(1) The terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned;

(2) The proposed transaction is consistent with the policy of each registered investment company concerned, as recited in its registration statement and reports filed under [the 1940 Act]; and

(3) The proposed transaction is consistent with the general purposes of [the 1940 Act].

6. The Section 17 Applicants submit that the In-Kind Transactions meet the conditions set forth in Section 17(b) of the 1940 Act.

7. The Section 17 Applicants submit that the terms of the In-Kind Transactions, including the consideration to be paid and received, are reasonable, fair, and do not involve overreaching because: (1) The Contract Owners' Contract values will not be adversely impacted or diluted; (2) with respect to those securities for which market quotations are readily available, the In-Kind Transactions will comply with the conditions set forth in Rule 17a–7, other than the requirement relating to cash consideration; and (3) with respect to those securities for which market quotations are not readily available, the In-Kind Transactions will be effected in accordance with the relevant Existing Funds' and the relevant corresponding Replacement Funds' normal valuation procedures, as described in the relevant fund's registration statement.

8. Section 17 Applicants represent that Contract Owners' Contract values will not be adversely impacted or diluted because the In-Kind Transactions will be effected at the respective net asset values of the Existing Funds and the Replacement Funds, as described in each fund's registration statement and as required by Rule 22c–1 under the 1940 Act. The In-Kind Transactions will not change the dollar value of any Contract, the accumulation unit value or annuity unit value of any Contract, or the death benefit payable under any Contract. After the In-Kind Transactions, the value of a Separate Account's investment in a Replacement Fund will equal the value of its investments in the corresponding Existing Fund (in addition to any pre-existing investment in the Replacement Fund) before the In-Kind Transactions.

9. The adopting release of Rule 17a–7 states that the purpose of the rule is to set forth ''conditions as to the availability of the exemption to those situations where the Commission, upon the basis of its experience, considers that there is no likelihood of overreaching of the investment companies participating in the transaction.'' [4] Because the proposed In-Kind Transactions would comply in substance with the conditions of the rule and since the In-Kind Transactions will be effected at the respective net asset values of the relevant funds, as per the registration statement for each fund and as required by Rule 22c–1 under the 1940 Act, the Section 17 Applicants submit that the terms of the In-Kind Transactions do not present a situation where the investment companies participating in the transaction could overreach and potentially harm investors. Section 17 Applicants claim that the purposes intended by implementation of the rule are therefore met by the terms of the In-Kind Transactions.

10. Section 17 Applicants represent that the proposed In-Kind Transactions will be effected based upon the independent current market price of the portfolio securities as specified in Rule 17a–7(b). Section 17 Applicants claim that the proposed In-Kind Transactions will be consistent with the policy of each registered investment company and separate series thereof participating in the In-Kind Transactions, as recited in the relevant registered investment company's registration statement and reports in accordance with Rule 17a–

[4] 1940 Act Rel. Nos. 4604 (May 20, 1966) (proposing release) and 4697 (Sept. 8, 1966) (adopting release).

7(c). No brokerage commission, fee (except for any customary transfer fees), or other remuneration will be paid in connection with the proposed In-Kind Transactions as specified in Rule 17a–7(d). NVIT's board of directors has adopted and implemented the fund governance and oversight procedures as required by Rule 17a–7(e) and (f). Finally, a written record of the procedures for the proposed In-Kind Transactions will be maintained and preserved in accordance with Rule 17a–7(g).

11. Although the proposed In-Kind Transactions will not comply with the cash consideration requirement of Rule 17a–7(a), Section 17 Applicants assert that the terms of the proposed In-Kind Transactions will offer to each of the relevant Existing Funds and each of the relevant Replacement Funds the same degree of protection from overreaching that Rule 17a–7 generally provides in connection with the purchase and sale of securities under that Rule in the ordinary course of business. Specifically, Insurance Company Applicants and their affiliates cannot effect the proposed In-Kind Transactions at a price that is disadvantageous to any Replacement Fund and the proposed In-Kind Transactions will not occur absent an exemptive order from the Commission.

12. Section 17 Applicants represent that for those Existing Funds that will redeem their shares in-kind as part of the In-Kind Transactions, such transactions will be consistent with the investment policies of the Existing Fund because: (1) The redemption in-kind policy is stated in the relevant Existing Fund's current registration statement; and (2) the shares will be redeemed at their net asset value in conformity with Rule 22c–1 under the 1940 Act. Likewise, for the Replacement Funds that will sell shares in exchange for portfolio securities as part of the In-Kind Transactions, such transactions will be consistent with the investment policies of the Replacement Fund because: (1) NVIT's policy of selling shares in exchange for investment securities is stated in NVIT's current registration statement; (2) the shares will be sold at their net asset value; and (2) the investment securities will be of the type and quality that a Replacement Fund could have acquired with the proceeds from the sale of its shares had the shares been sold for cash. For each of the proposed In-Kind Transactions, the Adviser and relevant Sub-Adviser(s) will analyze the portfolio securities being offered to each relevant Replacement Fund and will retain only those securities that it would have acquired for each such Fund in a cash transaction.

13. Section 17 Applicants represent that all in-kind redemptions from an Existing Fund of which any Section 17 Applicants is an affiliated person will be effected in accordance with the conditions set forth in the Commission's no-action letter issued to *Signature Financial Group, Inc.* (available December 28, 1999).

14. Section 17 Applicants assert that the proposed In-Kind Transactions, as described herein, are consistent with the general purposes of the 1940 Act set forth in Section 1 of the 1940 Act. In particular, the proposed In-Kind Transactions do not present any conditions or abuses that the 1940 Act was designed to prevent.

15. Section 17 Applicants request that the Commission issue an order pursuant to Section 17(b) of the 1940 Act to permit them, to the extent necessary, to carry out the proposed In-Kind Transactions. Section 17 Applicants submit that, for all the reasons stated above: (1) The terms of the proposed In-Kind Transactions, including the consideration to be paid and received, are reasonable and fair to each of the relevant Replacement Funds, each of the relevant Existing Funds, and Contract Owners, and that the proposed In-Kind Transactions do not involve overreaching on the part of any person concerned; (2) the proposed In-Kind Transactions are, or will be, consistent with the policies of the relevant Replacement Funds and the relevant Existing Funds as stated in the relevant investment company's registration statement and reports filed under the 1940 Act; and (3) the proposed In-Kind Transactions are, or will be, consistent with the general purposes of the 1940 Act.

Conclusion

Section 26 Applicants submit that for the reasons summarized above the proposed Substitutions meet the standards of Section 26(c) of the 1940 Act and request that the Commission issue an order of approval pursuant to Section 26(c) of the 1940 Act. Section 17 Applicants submit that the proposed In-Kind Transactions meet the standards of Section 17(b) of the 1940 Act and request that the Commission issue an order of exemption pursuant to Section 17(b) of the 1940 Act.

For the Commission, by the Division of Investment Management pursuant to delegated authority.

Florence E. Harmon,

Deputy Secretary.

Appendix

1. AIM Variable Insurance Funds—AIM V.I. Basic Value Fund Replaced by the NVIT—NVIT Multi-Manager Large Cap Value Fund (Substitution Table Reference Nos. 1 & 2)

AIM Variable Insurance Funds—AIM V.I. Basic Value Fund: Series I Shares will be replaced by the NVIT—NVIT Multi-Manager Large Cap Value Fund: Class I shares. AIM Variable Insurance Funds—AIM V.I. Basic Value Fund: Series II Shares will be replaced by the NVIT—NVIT Multi-Manager Large Cap Value Fund: Class II shares.

The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of the AIM Variable Insurance Funds—AIM V.I. Basic Value Fund: Series I Shares, AIM Variable Insurance Funds—AIM V.I. Basic Value Fund: Series II Shares, NVIT—NVIT Multi-Manager Large Cap Value Fund: Class I, and NVIT—NVIT Multi-Manager Large Cap Value Fund: Class II.

[5] Through April 30, 2010, the fund's advisor has contractually agreed to waive a portion of its advisory fees to the extent necessary so that the advisory fees payable by the fund do not exceed a specified maximum annual advisory fee rate, wherein the fee rate is based upon average net asset levels as follows:

0.695% of the first $250 million,
0.67% of the next $250 million,
0.645% of the next $500 million,
0.62% of the next $1.5 billion,
0.595% of the next $2.5 billion,
0.57% of the next $2.5 billion,
0.545% of the next $2.5 billion,
0.52% of the excess over $10 billion.

[6] ''Other Expenses'' include administrative services fees which currently are 0.15%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 1.02% and 1.27%, respectively.

[7] NVIT and NFA have entered into a written contract limiting operating expenses to 0.77% until May 1, 2010. This limit excludes certain Fund expenses, including interest, taxes, brokerage commissions, Rule 12b–1 fees, fees paid pursuant to an Administrative Services Plan, short sale dividend expenses, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse the NFA for management fees previously waived or reduced and/or for expenses previously paid by

	Existing fund		Replacement fund	
	AIM variable insurance funds—AIM V.I. basic value fund shares		NVIT–NVIT multi-manager large cap value fund	
	Series I	Series II	Class I	Class II
Management Fees	[5] 0.68%	[5] 0.68%	0.65%	0.65%
12b–1 Fees	0.00%	0.25%	0.00%	0.25%
Other Expenses	0.35%	0.35%	[6] 0.37%	[6] 0.37%
Total Gross Expenses	1.03%	1.28%	1.02%	1.27%
Waivers/Reimbursements	0.00%	0.00%	[7] 0.10%	[7] 0.10%
Total Net Expenses	1.03%	1.28%	0.92%	1.17%
Fund/Class [8] Asset Level ($MMs) (5/20/09)	[9] $170.3	[10] $143.4	$0.2	$5.9

2. AIM Variable Insurance Funds—AIM V.I. Large Cap Growth Fund: Series I Shares Replaced by the NVIT—NVIT Multi-Manager Large Cap Growth Fund: Class I (Substitution Table Reference No. 3)

The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of the AIM Variable Insurance Funds—AIM V.I. Large Cap Growth Fund: Series I Shares and the NVIT—NVIT Multi-Manager Large Cap Growth Fund: Class I.

	Existing fund	Replacement fund
	AIM Variable Insurance Funds—AIM V.I. Large Cap Growth Fund: Series I Shares	NVIT—NVIT Multi-Manager Large Cap Growth Fund: Class I
Management Fees	[11] 0.70%	0.65%
12b–1 Fees	0.00%	0.00%
Other Expenses	0.40%	[12] 0.36%

NFA, provided, however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

[8] Represents assets held by the fund or listed share class, as applicable.

[9] Based on asset levels as of 3/31/09, approximately 2% of AIM V.I. Basic Value Fund Shares: Series I assets will be transferred to NVIT Multi-Manager Large Cap Value Fund: Class I pursuant to the Substitution. This transfer represents approximately 1% of the Existing Fund's total assets.

[10] Based on asset levels as of 3/31/09, approximately 19% of AIM V.I. Basic Value Fund Shares: Series II assets will be transferred to NVIT Multi-Manager Large Cap Value Fund: Class II pursuant to the Substitution. This transfer represents approximately 9% of the Existing Fund's total assets.

[11] Through April 30, 2010, the fund's advisor has contractually agreed to waive a portion of its advisory fees to the extent necessary so that the advisory fees payable by the fund do not exceed a specified maximum annual advisory fee rate, wherein the fee rate is based upon average levels as follows:

0.695% of the first $250 million,
0.67% of the next $250 million,
0.645% of the next $500 million,
0.62% of the next $1.5 billion,
0.595% of the next $2.5 billion,
0.57% of the next $2.5 billion,
0.545% of the next $2.5 billion,
0.52% of the excess over $10 billion.

[12] ''Other Expenses'' include administrative services fees which currently are 0.15%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 1.00%.

[13] The fund's advisor has contractually agreed to waive advisory fees and/or reimburse expenses to the extent necessary to limit Total Annual Fund Operating Expenses (excluding certain items discussed below) to 1.01% of average daily net assets. In determining the advisor's obligation to waive advisory fees and/or reimburse expenses, the following expenses are not taken into account, and could cause the Total Annual Fund Operating Expenses to exceed the number reflected above: (i) Interest; (ii) taxes; (iii) dividend expense on short sales; (iv) extraordinary items; (v) expenses related to a merger or reorganization, as approved by the fund's Board of Trustees; and (vi) expenses that the fund has incurred but did not actually pay because of an expense offset arrangement. Currently, the expense offset arrangements from which the fund may benefit are in the form of credits that the fund receives from banks where the fund or its transfer agent has deposit accounts in which it holds uninvested cash. These credits are used to pay certain expenses incurred by the fund. This expense limitation agreement is in effect through at least April 30, 2010.

[14] NVIT and NFA have entered into a written contract limiting operating expenses to 0.75% until at least May 1, 2010. This limit excludes certain Fund expenses, including any taxes, interest, brokerage fees, Rule 12b–1 fees, short-sale dividend expenses, administrative services fees, other expenses which are capitalized in accordance with generally accepted accounting principles and may exclude other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived and/or for expenses previously paid by NFA, provided however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

[15] Represents assets held by the fund or listed share class, as applicable.

[16] Based on asset levels as of 3/31/09, approximately 0.1% of the Existing Fund's Series I assets will be transferred to the Replacement Fund pursuant to the Substitution. This transfer represents approximately 0.3% of the Existing Fund's total assets.

[17] The fund pays the advisor a single, unified management fee for arranging all services necessary for the fund to operate. The fee shown is based on assets during the fund's most recent fiscal year. The fund has a stepped fee schedule, which is reflected in the following table:

1.00% of first $500 million,
0.95% of the next $500 million, and
0.90% over $1 billion.

[18] ''Other Expenses'' include administrative services fees which currently are 0.07%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 1.07%.

[19] NVIT and NFA have entered into a written contract limiting operating expenses to 0.82% until at least May 1, 2010. This limit excludes certain Fund expenses, including any interest, taxes, brokerage commissions, Rule 12b-1 fees, fees paid pursuant to an Administrative Services Plan, short-sale dividend expenses, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived or reduced and/or for expenses previously paid by NFA, provided however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

	Existing fund	Replacement fund
	AIM Variable Insurance Funds—AIM V.I. Large Cap Growth Fund: Series I Shares	NVIT—NVIT Multi-Manager Large Cap Growth Fund: Class I
Total Gross Expenses	1.10%	1.01%
Waivers/Reimbursements	[13] 0.09%	[14] 0.11%
Total Net Expenses	1.01%	0.90%
Fund/Class [15] Asset Level ($MMs) (5/20/09)	[16] $63.5	$0.6

3. American Century Variable Portfolios, Inc.—American Century VP Capital Appreciation Fund: Class I Replaced by the NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I (Substitution Table Reference No. 4)

The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of the American Century Variable Portfolios, Inc.—American Century VP Capital Appreciation Fund: Class I and the NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I.

	Existing fund	Replacement fund
	American Century Variable Portfolios, Inc.—American Century VP Capital Appreciation Fund: Class I	NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I
Management Fees	[17] 1.00%	0.75%
12b–1 Fees	0.00%	0.00%
Other Expenses	0.01%	[18] 0.22%
Total Gross Expenses	1.01%	0.97%
Waivers/Reimbursements	0.00%	[19] 0.08%
Total Net Expenses	1.01%	0.89%
Fund/Class [20] Asset Level ($MMs) (9/30/08)	[21] $288.0	$87.7

4. American Century Variable Portfolios, Inc.—American Century VP International Fund Replaced by the NVIT—NVIT Multi-Manager International Growth Fund (Substitution Table Reference Nos. 5, 6, 7, & 8)

American Century Variable Portfolios, Inc.—American Century VP International Fund: Class I will be replaced by NVIT—NVIT Multi-Manager International Growth Fund: Class III. American Century Variable Portfolios, Inc.—American Century VP International Fund: Class II will be replaced by NVIT—NVIT Multi-Manager International Growth Fund: Class VI. American Century Variable Portfolios, Inc.—American Century VP International Fund: Class III will be replaced by NVIT—NVIT Multi-Manager International Growth Fund: Class III. American Century Variable Portfolios, Inc.—American Century VP International Fund: Class IV will be replaced by NVIT—NVIT Multi-Manager International Growth Fund: Class VI. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of the American Century Variable Portfolios, Inc.—American Century VP International Fund: Class I, American Century Variable Portfolios, Inc.—American Century VP International Fund: Class II, American Century Variable Portfolios, Inc.—American Century VP International Fund: Class III, American Century Variable Portfolios, Inc.—American Century VP International Fund: Class IV, NVIT—NVIT Multi-Manager International Growth Fund: Class III and NVIT—NVIT Multi-Manager International Growth Fund: Class VI.

	Existing fund				Replacement fund	
	American Century Variable Portfolios, Inc.—American Century VP International Fund				NVIT—NVIT Multi-Manager International Growth Fund	
	Class I	Class II	Class III	Class IV	Class III	Class VI
Management Fees	[22] 1.36%	[23] 1.26%	[22] 1.36%	[23] 1.26%	0.85%	0.85%
12b–1 Fees	0.00%	0.25%	0.00%	0.25%	0.00%	0.25%
Other Expenses	0.01%	0.01%	0.01%	0.01%	[24] 0.30%	[24] 0.30%
Total Gross Expenses	1.37%	1.52%	1.37%	1.52%	1.15%	1.40%
Waivers/Reimbursements	0.00%	0.00%	0.00%	0.00%	[25] 0.04%	[25] 0.04%
Total Net Expenses	1.37%	1.52%	1.37%	1.52%	1.11%	1.36%
Fund/Class [26] Asset Level ($MMs) (4/30/09)	[27] $258.2	[28] $105.1	[29] $52.0	[30] $9.8	$9.8	$90.6

5. American Century Variable Portfolios, Inc.—American Century VP Ultra Fund Replaced by NVIT—NVIT Multi-Manager Large Cap Growth Fund (Substitution Table Reference Nos. 9 & 10)

AmericanCentury Variable Portfolios, Inc.—American Century VP Ultra Fund: Class I will be replaced by NVIT—NVIT Multi-Manager Large Cap Growth Fund: Class I and American Century Variable Portfolios, Inc.—American Century VP Ultra Fund: Class II will be replaced by NVIT—NVIT Multi-Manager Large Cap Growth Fund: Class II. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of the American Century Variable Portfolios, Inc.—American Century VP Ultra Fund: Class I, American Century Variable Portfolios, Inc.—American Century VP Ultra Fund: Class II, NVIT—NVIT Multi-Manager Large Cap Growth Fund: Class I and NVIT—NVIT Multi-Manager Large Cap Growth Fund: Class II.

	Existing fund		Replacement fund	
	American Century Variable Portfolios, Inc.—American Century VP Ultra Fund		NVIT—NVIT Multi-Manager Large Cap Growth Fund	
	Class I	Class II	Class I	Class II
Management Fees	[31] 1.00%	[32] 0.90%	0.65%	0.65%
12b–1 Fees	0.00%	0.25%	0.00%	0.25%
Other Expenses	0.01%	0.01%	[33] 0.36%	[34] 0.36%
Total Gross Expenses	1.01%	1.16%	1.01%	1.26%
Waivers/Reimbursements	0.00%	0.00%	[35] 0.11%	[35] 0.11%
Total Net Expenses	1.01%	1.16%	0.90%	1.15%
Fund/Class [36] Asset Level ($MMs) (4/30/09)	[37] $37.2	[38] $177.6	$0.6	$1.4

6. American Century Variable Portfolios, Inc.—American Century VP Vista Fund Replaced by NVIT—NVIT Multi-Manager Mid Cap Growth Fund (Substitution Table Reference Nos. 11, 12, & 13)

American Century Variable Portfolios, Inc.—American Century VP Vista Fund:

[20] Represents assets held by the fund or listed share class, as applicable.

[21] Based on asset levels as of 3/31/09, approximately 27% of the Existing Fund's Class I assets will be transferred to the Replacement Fund pursuant to the Substitution. This transfer represents approximately 27% of the Existing Fund's total assets.

[22] The fund pays the advisor a single, unified management fee for arranging all services necessary for the fund to operate. The fund has a stepped fee schedule, which is as follows: 1.50% of first $250 million, 1.20% of the next $250 million, 1.10% of the next $500 million, and 1.00% over $1 billion. The fee shown has been restated based on strategy assets for the period from the most recent fiscal year end through March 31, 2009. As a result, the Total Annual Fund Operating Expenses in this table differ from those shown in the fund's prospectus or statement of additional information. The fee for the fiscal year ended December 31, 2008 was 1.23%.

[23] The fund pays the advisor a single, unified management fee for arranging all services necessary for the fund to operate. The fund has a stepped fee schedule, which is as follows: 1.40% of first $250 million, 1.10% of the next $250 million, 1.00% of the next $500 million, and 0.90% over $1 billion. The fee shown has been restated based on strategy assets for the period from the most recent fiscal year end through March 31, 2009. As a result, the Total Annual Fund Operating Expenses in this table differ from those shown in the fund's prospectus and statement of additional information. The fee for the fiscal year ended December 31, 2008 was 1.13%.

[24] ''Other Expenses'' include administrative services fees which currently are 0.15%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 1.21% and 1.46%, respectively.

[25] NVIT and NFA have entered into a written contract limiting operating expenses to 0.96% until at least May 1, 2010. This limit excludes certain Fund expenses, including any taxes, interest, brokerage fees, Rule 12b–1 fees, short-sale dividend expenses, administrative services fees, other expenses which are capitalized in accordance with generally accepted accounting principles and may exclude other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived and/or for expenses previously paid by NFA, provided however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

[26] Represents assets held by the fund or listed share class, as applicable.

[27] Based on asset levels as of 3/31/09, approximately 23% of the Existing Fund's Class I assets will be transferred to the Replacement Fund's Class III pursuant to the Substitution. This transfer represents approximately 16% of the Existing Fund's total assets.

[28] Based on asset levels as of 3/31/09, approximately 2% of the Existing Fund's Class II assets will be transferred to the Replacement Fund's Class VI pursuant to the Substitution. This transfer represents approximately 0.3% of the Existing Fund's total assets.

[29] Based on asset levels as of 3/31/09, approximately 87% of the Existing Fund's Class III assets will be transferred to the Replacement Fund's Class III pursuant to the Substitution. This transfer represents approximately 12% of the Existing Fund's total assets.

[30] Based on asset levels as of 3/31/09, approximately 90% of the Existing Fund's Class IV assets will be transferred to the Replacement Fund pursuant to the Substitution. This transfer represents approximately 2% of the Existing Fund's total assets.

[31] The fund pays the advisor a single, unified management fee for arranging all services necessary for the fund to operate. The fee shown is based on assets during the fund's most recent fiscal year. The fund has s stepped fee schedule. As a result, the fund's unified management fee rate generally decreases as strategy assets increase and increases as strategy assets decrease.

[32] The fund pays the advisor a single, unified management fee for arranging all services necessary for the fund to operate. The fee shown is based on assets during the fund's most recent fiscal year. The fund has s stepped fee schedule, which is as follows:

0.90% of first $500 million,

0.85% of next $500 million, and

0.80% over $1 billion.

[33] ''Other Expenses'' include administrative services fees which currently are 0.15%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 1.00%.

[34] ''Other Expenses'' include administrative services fees which currently are 0.15%, but which

Continued

Class I will be replaced by NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I. American Century Variable Portfolios, Inc.—American Century VP Vista Fund: Class II will be replaced by NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I or Class II, depending on the contract involved in the Substitution. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of American Century Variable Portfolios, Inc.—American Century VP Vista Fund: Class I, American Century Variable Portfolios, Inc.—American Century VP Vista Fund: Class II, NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I and NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class II.

	Existing fund		Replacement fund	
	American Century Variable Portfolios, Inc.—American Century VP Vista Fund		NVIT—NVIT Multi-Manager Mid Cap Growth Fund	
	Class I	Class II	Class I	Class II
Management Fees	1.00%	0.90%	0.75%	0.75%
12b–1 Fees	0.00%	0.25%	0.00%	0.25%
Other Expenses	0.01%	0.01%	[39] 0.22%	[39] 0.22%
Total Gross Expenses	1.01%	1.16%	0.97%	1.22%
Waivers/Reimbursements	0.00%	0.00%	[40] 0.08%	[40] 0.08%
Total Net Expenses	1.01%	1.16%	0.89%	1.14%
Fund/Class [41] Asset Level ($MMs) (4/30/09)	[42] $37.7	[43] $11.7	$87.7	$134.2

7. Credit Suisse Trust—International Equity Flex I Portfolio (Formerly, International Focus Portfolio) Replaced by NVIT—Gartmore NVIT International Equity Fund (Substitution Table Reference Nos. 14 & 15)

Credit Suisse Trust—International Equity Flex I Portfolio (formerly, International Focus Portfolio) will be replaced by NVIT—Gartmore NVIT International Equity Fund: Class I or

are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 1.25%.

[35] NVIT and NFA have entered into a written contract limiting operating expenses to 0.75% until at least May 1, 2010. This limit excludes certain Fund expenses, including any taxes, interest, brokerage fees, Rule 12b–1 fees, short-sale dividend expenses, administrative services fees, other expenses which are capitalized in accordance with generally accepted accounting principles and may exclude other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived and/or for expenses previously paid by NFA, provided however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

[36] Represents assets held by the fund or listed share class, as applicable.

[37] Based on asset levels as of 3/31/09, approximately 22% of the Existing Fund's Class I assets will be transferred to the Replacement Fund's Class I pursuant to the Substitution. This transfer represents approximately 4% of the Existing Fund's total assets.

[38] Based on asset levels as of 3/31/09, approximately 4% of the Existing Fund's Class II assets will be transferred to the Replacement Fund's Class II pursuant to the Substitution. This transfer represents approximately 4% of the Existing Fund's total assets.

[39] ''Other Expenses'' include administrative services fees which currently are 0.07%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 1.07% and 1.32%, respectively.

[40] NVIT and NFA have entered into a written contract limiting operating expenses to 0.82% for all share classes until at least May 1, 2010. This limit excludes certain Fund expenses, including any interest, taxes, brokerage commissions, Rule 12b–1 fees, fees paid pursuant to an Administrative Services Plan, short-sale dividend expenses, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived or reduced and/or for expenses previously paid by NFA, provided however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

[41] Represents assets held by the fund or listed share class, as applicable.

[42] Based on asset levels as of 3/31/09, approximately 29% of the Existing Fund's Class I assets will be transferred to the Replacement Fund's Class I pursuant to the Substitution. This transfer represents approximately 22% of the Existing Fund's total assets.

[43] Based on asset levels as of 3/31/09, approximately 2% of the Existing Fund's Class II assets will be transferred to the Replacement Fund's Class I pursuant to the Substitution. This transfer represents approximately 0.5% of the Existing Fund's total assets. Based on asset levels as of 3/31/09, approximately 94% of the Existing Fund's Class II assets will be transferred to the Replacement Fund's Class II pursuant to the Substitution. This transfer represents approximately 22% of the Existing Fund's total assets.

[44] Management fees have been restated to reflect the elimination of a performance-based management fee and implementation of an asset-based management fee equal to the lowest possible management fee under the previous performance-based fee structure, as approved by the Board of Trustees on January 16, 2009. Under no circumstances, during a six-month transition period will the management fee under the new fee structure exceed what the Adviser would have received under the old structure assuming maximum penalty for underperformance.

[45] ''Other Expenses'' include administrative services fees which currently are 0.15%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses would be 1.21%.

[46] NVIT and NFA have entered into a written contract limiting operating expenses to 1.05% for all share classes until at least May 1, 2010. This limit excludes certain Fund expenses, including interest, taxes, brokerage commissions, Rule 12b–1 fees, fees paid pursuant to an Administrative Services Plan, short-sale dividend expenses, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived or reduced and/or for expenses previously paid by NFA provided, however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement. Currently, all share classes are operating below the expense limit.

[47] Represents assets held by the fund or listed share class, as applicable.

[48] Based on asset levels as of 3/31/09, approximately 0.5% of the Existing Fund's assets will be transferred to the Replacement Fund's Class I pursuant to the Substitution. This transfer represents approximately 0.5% of the Existing Fund's total assets. Based on asset levels as of 3/31/09, approximately 47% of the Existing Fund's

Class III, depending on the contract involved in the Substitution. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of Credit Suisse Trust—International Equity Flex I Portfolio, NVIT—Gartmore NVIT International Equity Fund: Class I and NVIT—Gartmore NVIT International Equity Fund: Class III.

	Existing fund	Replacement fund	
	Credit Suisse Trust—International Equity Flex I Portfolio	NVIT—Gartmore NVIT International Equity Fund	
		Class I	Class III
Management Fees	1.00%	[44] 0.80%	[44] 0.80%
12b–1 Fees	0.00%	0.00%	0.00%
Other Expenses	1.14%	[45] 0.31%	[45] 0.31%
Total Gross Expenses	2.14%	1.11%	1.11%
Waivers/Reimbursements	0.00%	[46] 0.00%	[46] 0.00%
Total Net Expenses	2.14%	1.11%	1.11%
Fund/Class [47] Asset Level ($MMs) (5/20/09)	[48] $44.5	$8.1	$35.4

8. Federated Insurance Series—Federated Quality Bond Fund II Replaced by NVIT—NVIT Core Bond Fund (Substitution Table Reference Nos. 16 & 17)

Federated Insurance Series—Federated Quality Bond Fund II: Primary Shares will be replaced by NVIT—NVIT Core Bond Fund: Class I. Federated Insurance Series—Federated Quality Bond Fund II: Service Shares will be replaced by NVIT—NVIT Core Bond Fund: Class II. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of Federate Insurance Series—Federated Quality Bond Fund II: Primary Shares, Federate Insurance Series—Federated Quality Bond Fund II: Service Shares, NVIT—NVIT Core Bond Fund: Class I and NVIT—NVIT Core Bond Fund: Class II.

	Existing fund		Replacement fund	
	Federated Insurance Series—Federated Quality Bond Fund II		NVIT—NVIT Core Bond Fund	
	Primary	Service	Class I	Class II
Management Fees	[49] 0.60%	[49] 0.60%	0.40%	0.40%
12b–1 Fees	[50] 0.25%	0.25%	0.00%	0.25%
Other Expenses	[51] 0.39%	[51] 0.39%	[52] 0.37%	[52] 0.37%
Total Gross Expenses	1.24%	1.24%	0.77%	1.02%
Waivers/Reimbursements	[53] 0.00%	0.00%	[54] 0.07%	[54] 0.07%
Total Net Expenses	1.24%	1.24%	0.70%	0.95%
Fund/Class [55] Asset Level ($MMs) (5/19/09)	[56] $218.5	[57] $62.7	$4.8	$7.1

9. Franklin Templeton Variable Insurance Products Trust—Templeton Developing Markets Securities Fund Replaced by NVIT—Gartmore NVIT Emerging Markets Fund (Substitution Table Reference Nos. 18 & 19)

Franklin Templeton Variable Insurance Products Trust—Templeton Developing Markets Securities Fund:

assets will be transferred to the Replacement Fund's Class III pursuant to the Substitution. This transfer represents approximately 47% of the Existing Fund's total assets.

[49] The Adviser voluntarily waived a portion of the management fee. The Adviser can terminate this voluntary waiver at any time. The management fee paid by the Fund (after the voluntary waiver) was 0.56% for the fiscal year ended December 31, 2008.

[50] The Fund's Primary Shares did not pay or accrue the distribution (12b–1) fee during the fiscal year ended December 31, 2008. The Fund's Primary Shares have no present intention of paying or accruing the distribution (12b–1) fee during the fiscal year ending December 31, 2009.

[51] Includes an administrative services fee which is used to compensate insurance companies for shareholder services. The shareholder services provider did not charge, and therefore the Fund's Primary Shares did not accrue, its fee. This reduction can be terminated at any time. Total other expenses paid by the Fund's Primary Shares (after the reduction) were 0.14% for the fiscal year ended December 31, 2008.

[52] ''Other Expenses'' include administrative services fees which currently are 0.15%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 0.80% and 1.05% respectively.

[53] Although not contractually obligated to do so, the Adviser waived and the distributor and shareholder services provider elected not to charge 0.56% in expenses, resulting in Total Net Expenses (after waiver reductions) of 0.70%.

[54] NVIT and NFA have entered into a written contract limiting operating expenses to 0.55% for all share classes until May 1, 2010. This limit excludes certain Fund expenses, including interest, taxes, brokerage commissions, Rule 12b–1 fees, fees paid pursuant to an Administrative Services Plan, short sale dividend expenses, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously

Continued

Class 3 will be replaced by NVIT—Gartmore NVIT Emerging Markets Fund: Class III or NVIT—Gartmore NVIT Emerging Markets Fund: Class VI, depending on the contract involved in the Substitution. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of Franklin Templeton Variable Insurance Products Trust—Templeton Developing Markets Securities Fund: Class 3, NVIT—Gartmore NVIT Emerging Markets Fund: Class III and NVIT—Gartmore NVIT Emerging Markets Fund: Class VI.

	Existing fund	Replacement fund	
	Franklin Templeton Variable Insurance Products Trust—Templeton Developing Markets Securities Fund	NVIT—Gartmore NVIT Emerging Markets Fund	
	Class 3	Class III	Class VI
Management Fees	1.25%	[58] 0.95%	[58] 0.95%
12b–1 Fees	[59] 0.25%	0.00%	0.25%
Other Expenses	0.29%	[60] 0.29%	[60] 0.28%
Total Gross Expenses	1.79%	1.24%	1.48%
Waivers/Reimbursements	[61] 0.01%	[62] 0.00%	[62] 0.00%
Total Net Expenses	1.78%	1.24%	1.48%
Fund/Class[63] Asset Level ($MMs) (5/20/09)	[64] $42.3	$101.6	$44.8

10. Janus Aspen Series—INTECH Risk-Managed Core Portfolio Replaced by NVIT—NVIT Nationwide Fund (Substitution Table Reference Nos. 20 & 21)

Janus Aspen Series—INTECH Risk-Managed Core Portfolio: Service Shares will be replaced by NVIT—NVIT Nationwide Fund: Class I or Class II, depending on the contract involved in the Substitution. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of Janus Aspen Series—INTECH Risk-Managed Core Portfolio: Service Shares, NVIT—NVIT Nationwide Fund: Class I and NVIT—NVIT Nationwide Fund: Class II.

waived or reduced and/or for expenses previously paid by NFA, provided, however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

[55] Represents assets held by the fund or listed share class, as applicable.

[56] Based on asset levels as of 3/31/09, approximately 84% of the Existing Fund's Primary Share assets will be transferred to the Replacement Fund's Class I pursuant to the Substitution. This transfer represents approximately 65% of the Existing Fund's total assets.

[57] Based on asset levels as of 3/31/09, approximately 97% of the Existing Fund's Service Share assets will be transferred to the Replacement Fund's Class II pursuant to the Substitution. This transfer represents approximately 21.5% of the Existing Fund's total assets.

[58] Management fees have been restated to reflect the elimination of a performance-based management fee and implementation of an asset-based management fee equal to the lowest possible management fee under the previous performance-based fee structure, as approved by the Board of Trustees on September 18, 2008. Under no circumstances, during a six-month transition period will the management fee under the new fee structure exceed what the Adviser would have received under the old structure assuming maximum penalty for underperformance.

[59] While the maximum amount payable under the Fund's Class 3 rule 12b–1 plan is 0.35% per year of the Fund's average daily net assets, the Fund's board of trustees has set the current rate at 0.25% per year through April 30, 2010.

[60] ''Other Expenses'' include administrative services fees which currently are 0.16% and 0.15%, respectively, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses would be 1.33% and 1.58%, respectively.

[61] The investment manager has agreed in advance to reduce its fee from assets invested by the Fund in a Franklin Templeton money market fund (the Sweep Money Fund which is the ''acquired fund'' in this case) to the extent of the Fund's fees and expenses of the acquired fund. This reduction is required by the Trust's board of trustees and an exemptive order by the Securities and Exchange Commission; this arrangement will continue as long as the exemptive order is relied upon.

[62] NVIT and NFA have entered into a written contract limiting operating expenses to 1.20% for all share classes until at least May 1, 2010. This limit excludes certain Fund expenses, including interest, taxes, brokerage commissions, Rule 12b–1 fees, fees paid pursuant to an Administrative Services Plan, short sale dividend expenses, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived or reduced and/or for expenses previously paid by NFA provided, however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement. Currently, all share classes are operating below the expense limit.

[63] Represents assets held by the fund or listed share class, as applicable.

[64] Based on asset levels as of 3/31/09, approximately 30% of the Existing Fund's Class 3 assets will be transferred to the NVIT—Gartmore NVIT Emerging Markets Fund: Class III and approximately 36% of the Existing Fund's Class 3 assets will be transferred to NVIT—Gartmore NVIT Emerging Markets Fund: Class VI pursuant to the Substitution. These transfers represent approximately 5% of the Existing Fund's total assets.

[65] The ''Management Fee'' is the investment advisory fee rate paid by each Portfolio to Janus Capital as of the end of the fiscal year. This fee may go up or down monthly based on the Portfolio's performance relative to its benchmark index over the performance measurement period. This fee rate, prior to any performance adjustment, is 0.50% and may go up or down by a variable of up to 0.15% (assuming constant assets) on a monthly basis. Any such adjustment to this fee rate commenced January 2007, and may increase or decrease the Management Fee. The Portfolio has entered into an agreement with Janus Capital to limit certain expenses. Because a fee waiver will have a positive effect upon the Portfolio's performance, a fee waiver that is in place during the period when the performance adjustment applies may affect the performance adjustment in a way that is favorable to Janus Capital. It is possible that the cumulative dollar amount of additional compensation ultimately payable to Janus Capital may, under some circumstances, exceed the cumulative dollar amount of management fees waived by Janus Capital.

[66] ''Other Expenses'' include administrative services fees which currently are 0.15%, but which are permitted to be as high as 0.25%. The full amounts of administrative services fees are not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amounts of administrative services fees were charged, total operating expenses would be 0.94% and 1.19%, respectively.

[67] Janus Capital has contractually agreed to waive certain Portfolios' total operating expenses (excluding the distribution and shareholder servicing fee, the administrative services fee applicable to certain Portfolios, brokerage commissions, interest, dividends, taxes, and extraordinary expenses including, but not limited to, acquired fund fees and expenses) to until at least May 1, 2010.

[68] Represents assets held by the fund or listed share class, as applicable.

	Existing fund	Replacement fund	
	Janus Aspen Series—INTECH Risk-Managed Core Portfolio	NVIT—NVIT Nationwide Fund	
	Service Shares	Class I	Class II
Management Fees	0.40%[65]	0.58%	0.58%
12b–1 Fees	0.25%	0.00%	0.25%
Other Expenses	1.06%	[66] 0.26%	[66] 0.26%
Total Gross Expenses	1.71%	0.84%	1.09%
Waivers/Reimbursements	[67] 0.26%	0.00%	0.00%
Total Net Expenses	1.45%	0.84%	1.09%
Fund/Class[68] Asset Level ($MMs) (5/30/09)	[69] $20.5	$629.2	$316.6

11. Neuberger Berman Advisers Management Trust—AMT Growth Portfolio Replaced by NVIT—NVIT Multi-Manager Mid Cap Growth Fund (Substitution Table Reference No. 22)

Neuberger Berman Advisers Management Trust—AMT Growth Portfolio: I Class will be replaced by NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of Neuberger Berman Advisers Management Trust—AMT Growth Portfolio: I Class and NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I.

	Existing fund	Replacement fund
	Neuberger Berman Advisers Management Trust—AMT Growth Portfolio: I Class	NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I
Management Fees	0.85%	0.75%
12b–1 Fees	0.00%	0.00%
Other Expenses	0.19%	[70] 0.22%
Total Gross Expenses	1.04%	0.97%
Waivers/Reimbursements	[71] 0.00%	[72] 0.08%
Total Net Expenses	1.04%	0.89%
Fund/Class[73] Asset Level ($MMs) (5/20/09)	[74] $78.5	$87.7

12. Neuberger Berman Advisers Management Trust—AMT Guardian Portfolio Replaced by NVIT—Neuberger Berman NVIT Multi Cap Opportunities Fund (Substitution Table Reference No. 23)

Neuberger Berman Advisers Management Trust—AMT Guardian Portfolio: I Class will be replaced by NVIT—Neuberger Berman NVIT Multi Cap Opportunities Fund: Class I. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of Neuberger Berman Advisers Management Trust—AMT Guardian Portfolio: I Class and NVIT—Neuberger Berman NVIT Multi Cap Opportunities Fund: Class I.

[69] Based on asset levels as of 3/31/09, approximately 2% of the Existing Fund's Service Shares assets will be transferred to the NVIT—NVIT Nationwide Fund: Class I and approximately 22% of the Existing Fund's Service Shares assets will be transferred to the NVIT—NVIT Nationwide Fund: Class II pursuant to the Substitution. These transfers represent approximately 24% of the Existing Fund's total assets.

[70] ''Other Expenses'' include administrative services fees which currently are 0.07%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 1.07%.

[71] Neuberger Berman Management LLC (''NBM'') has contractually undertaken to limit the Fund's expenses through December 31, 2012 by reimbursing the Fund for its total operating expenses (excluding the compensation of NBM, taxes, interest, extraordinary expenses, brokerage commissions and transaction costs) that exceed, in the aggregate, 1.00% per annum of the Fund's average daily net asset value. Because of the exclusion, the Fund's net expenses may exceed the contractual expense limitation. The Fund has contractually undertaken to reimburse NBM for the excess expenses paid by NBM, provided the reimbursements do not cause total operating expenses (exclusive of the compensation of NBM, taxes, interest, brokerage commissions, transaction costs and extraordinary expenses) to exceed an annual rate of 1.00%, and the reimbursements are made within three years after the year in which NBM incurred the expense. The figures in the table are based on last year's expenses.

[72] NVIT and NFA have entered into a written contract limiting operating expenses to 0.82% for all share classes until at least May 1, 2010. This limit excludes certain Fund expenses, including any interest, taxes, brokerage commissions, Rule 12b–1 fees, fees paid pursuant to an Administrative Services Plan, short-sale dividend expenses, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived or reduced and/or for expenses previously paid by NFA, provided however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

[73] Represents assets held by the fund or listed share class, as applicable.

[74] Based on asset levels as of 3/31/09, approximately 88% of the Existing Fund's I Class assets will be transferred to the Replacement Fund's Class I pursuant to the Substitution. This transfer represents approximately 88% of the Existing Fund's total assets.

[75] ''Other Expenses'' include administrative services fees which currently are 0.15%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 1.00%.

[76] Neuberger Berman Management LLC (''NBM'') has contractually undertaken to limit the expenses of I Class shares through December 31, 2012 by

Continued

	Existing fund	Replacement fund
	Neuberger Berman Advisers Management Trust—AMT Guardian Portfolio: I Class	NVIT—Neuberger Berman NVIT Multi Cap Opportunities Fund: Class I
Management Fees	0.85%	0.60%
12b–1 Fees	0.00%	0.00%
Other Expenses	0.16%	1.50%[75]
Total Gross Expenses	1.01%	2.10%
Waivers/Reimbursements	0.00%[76]	1.20%[77]
Total Net Expenses	1.01%	0.90%
Fund/Class[78] Asset Level ($MMs) (5/20/09)	$62.4[79]	$2.9

13. Neuberger Berman Advisers Management Trust—AMT International Portfolio Replaced by NVIT—Gartmore NVIT International Equity Fund (Substitution Table Reference Nos. 24 & 25)

Neuberger Berman Advisers Management Trust—AMT International Portfolio: S Class will be replaced by NVIT—Gartmore NVIT International Equity Fund: Class III or Class VI, depending on the contract involved in the Substitution. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of Neuberger Berman Advisers Management Trust—AMT International Portfolio: S Class, NVIT—Gartmore NVIT International Equity Fund: Class III and NVIT—Gartmore NVIT International Equity Fund: Class VI.

	Existing fund	Replacement fund	
	Neuberger Berman Advisers Management Trust—AMT International Portfolio	NVIT—Gartmore NVIT International Equity Fund	
	S Class	Class III	Class VI
Management Fees	1.15%	[80] 0.80%	[80] 0.80%
12b–1 Fees	0.25%	0.00%	0.25%
Other Expenses	0.21%	[81] 0.31%	[81] 0.31%
Total Gross Expenses	1.61%	1.11%	1.36%
Waivers/Reimbursements	[82] 0.00%	[83] 0.00%	[83] 0.00%
Total Net Expenses	1.61%	1.11%	1.36%
Fund/Class[84] Asset Level ($MMs) (5/20/09)	[85] $284.0	$35.5	$5.0

14. Neuberger Berman Advisers Management Trust—AMT Mid-Cap Growth Portfolio Replaced by NVIT—NVIT Multi-Manager Mid Cap Growth Fund (Substitution Table Reference Nos. 26, 27, & 28)

Neuberger Berman Advisers Management Trust—AMT Mid-Cap Growth Portfolio: I Class will be replaced by NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I. Neuberger Berman Advisers Management Trust—AMT Mid-Cap Growth Portfolio: S Class will be replaced by NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I or Class II, depending on the contract involved in the Substitution. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of Neuberger Berman Advisers Management Trust—AMT Mid-Cap Growth Portfolio: I Class, Neuberger Berman Advisers Management Trust—AMT Mid-Cap Growth Portfolio: S Class, NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I and NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class II.

reimbursing the Fund for its total operating expenses, excluding compensation to NBM, taxes, interest, extraordinary expenses, transaction costs and brokerage commissions, that exceed, in the aggregate, 1.00% per annum of the Class's average daily net asset value. Because of the exclusion, the Fund's net expenses may exceed the contractual expense limitation. The Fund has in turn contractually undertaken to repay NBM from I Class assets for the excess operating expenses borne by NBM, so long as the Class's annual operating expenses during that period (exclusive of compensation to NBM, taxes, interest, extraordinary expenses and brokerage commissions) does not exceed 1.00% per year of the Class's average daily net assets, and further provided that the reimbursements are made within three years after the year in which NBM incurred the expense. The figures in the table are based on last year's expenses.

[77] NVIT and NFA have entered into a written contract limiting operating expenses to 0.75% for all share classes until May 1, 2010. This limit excludes certain Fund expenses, including interest, taxes, brokerage commissions, Rule 12b–1 fees, fees paid pursuant to an Administrative Services Plan, short sale dividend expenses, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived or reduced and/or for expenses previously paid by NFA, provided, however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

[78] Represents assets held by the fund or listed share class, as applicable.

[79] Based on asset levels as of 3/31/09, approximately 70% of the Existing Fund's I Class assets will be transferred to the Replacement Fund's Class I pursuant to the Substitution. This transfer represents approximately 35% of the Existing Fund's total assets.

[80] Management fees have been restated to reflect the elimination of a performance-based management fee and implementation of an asset-based management fee equal to the lowest possible management fee under the previous performance-based fee structure, as approved by the Board of Trustees on January 16, 2009. Under no circumstances, during a six-month transition period will the management fee under the new fee structure exceed what the Adviser would have received under the old structure assuming maximum penalty for underperformance.

[81] ''Other Expenses'' include administrative services fees which currently are 0.15%, but which are permitted to be as high as 0.25%. The full

	Existing fund		Replacement fund	
	Neuberger Berman Advisers Management Trust—AMT Mid-Cap Growth Portfolio		NVIT—NVIT Multi-Manager Mid Cap Growth Fund	
	I Class	S Class	Class I	Class II
Management Fees	0.83%	0.83%	0.75%	0.75%
12b–1 Fees	0.00%	0.25%	0.00%	0.25%
Other Expenses	0.09%	0.10%	[86] 0.22%	[86] 0.22%
Total Gross Expenses	0.92%	1.18%	0.97%	1.22%
Waivers/Reimbursements	[87] 0.00%	[88] 0.00%	[89] 0.08%	[89] 0.08%
Total Net Expenses	0.92%	1.18%	0.89%	1.14%
Fund/Class [90] Asset Level ($MMs) (5/20/09)	[91] $331.0	[92] $37.3	$87.7	$134.2

15. Neuberger Berman Advisers Management Trust—AMT Partners Portfolio Replaced by NVIT—Neuberger Berman NVIT Multi Cap Opportunities Fund (Substitution Table Reference No. 29)

Neuberger Berman Advisers Management Trust—AMT Partners Portfolio: I Class will be replaced by NVIT—Neuberger Berman NVIT Multi Cap Opportunities Fund: Class I. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of Neuberger Berman Advisers Management Trust—AMT Partners Portfolio: I Class and NVIT—Neuberger Berman NVIT Multi Cap Opportunities Fund: Class I.

0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses would be 1.21% and 1.46%, respectively.

[82] Neuberger Berman Management Inc. (NBMI) has undertaken through December 31, 2012 to reimburse certain operating expenses, including the compensation of NBMI and excluding taxes, interest, extraordinary expenses, brokerage commissions and transaction costs, that exceed, in the aggregate, 2.00% of the average daily net asset value of the Fund. The expense limitation agreement is contractual and any excess expenses can be repaid to NBMI within three years of the year incurred, provided such recoupment would not cause the fund to exceed its contractual expense limitation. Moreover, NBMI has voluntarily committed to reimburse certain expenses, as stated above, for an additional 0.50% of the average daily net asset value of fund to maintain the Fund's net operating expense ratio at 1.50%. NBMI may, at its sole discretion, terminate this voluntary additional reimbursement commitment without notice. The figures in the table are based on last year's expenses.

[83] NVIT and NFA have entered into a written contract limiting operating expenses to 1.05% f until at least May 1, 2010. This limit excludes certain Fund expenses, including interest, taxes, brokerage commissions, Rule 12b–1 fees, fees paid pursuant to an Administrative Services Plan, short sale dividend expenses, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived or reduced and/or for expenses previously paid by NFA provided, however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement. Currently, all share classes are operating below the expense limit.

[84] Represents assets held by the fund or listed share class, as applicable.

[85] Based on asset levels as of 3/31/09, approximately 1% of the Existing Fund's S Class assets will be transferred to the NVIT—Gartmore NVIT International Equity Fund: Class III and approximately 3% of the Existing Fund's S Class assets will be transferred to the NVIT—Gartmore NVIT International Equity Fund: Class VI pursuant to the Substitution. These transfers represent approximately 4% of the Existing Fund's total assets.

[86] ''Other Expenses'' include administrative services fees which currently are 0.07%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 1.07% and 1.32%, respectively.

[87] Neuberger Berman Management LLC (''NBM'') has contractually undertaken to limit the expenses of I Class shares through December 31, 2012 by reimbursing the Fund for its total operating expenses, excluding compensation to NBM, taxes, interest, extraordinary expenses, transaction costs and brokerage commissions, that exceed, in the aggregate, 1.00% per annum of the Class's average daily net asset value. Because of the exclusion, the Fund's net expenses may exceed the contractual expense limitation. The Fund has in turn contractually undertaken to repay NBM from I Class assets for the excess operating expenses borne by NBM, so long as the Class's annual operating expenses during that period (exclusive of the compensation to NBM, taxes, interest, extraordinary expenses and brokerage commissions) does not exceed 1.00% per year of the Class's average daily net assets, and further provided that the reimbursements are made within three years after the year in which NBM incurred the expense. The figures in the table are based on last year's expenses.

[88] Neuberger Berman Management Inc. (NBMI) has contractually undertaken to limit the expenses of S Class shares through December 31, 2012 by reimbursing the Fund for its total operating expenses, including compensation to NBMI, but excluding taxes, interest, extraordinary expenses, transaction costs and brokerage commissions, that exceed, in the aggregate, 1.25% per annum of the Class's average daily net asset value. The Fund has in turn contractually undertaken to repay NBMI from S Class assets for the excess operating expenses borne by NBMI, so long as the Class's annual operating expenses during that period (exclusive of taxes, interest, extraordinary expenses and brokerage commissions) does not exceed 1.25% per year of the Class's average daily net assets, and further provided that the reimbursements are made within three years after the year in which NBMI incurred the expense. The figures in the table are based on last year's expenses.

[89] NVIT and NFA have entered into a written contract limiting operating expenses to 0.82% until at least May 1, 2010. This limit excludes certain Fund expenses, including any interest, taxes, brokerage commissions, Rule 12b–1 fees, fees paid pursuant to an Administrative Services Plan, short-sale dividend expenses, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived or reduced and/or for expenses previously paid by NFA, provided however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

[90] Represents assets held by the fund or listed share class, as applicable.

[91] Based on asset levels as of 3/31/09, approximately 22% of the Existing Fund's I Class assets will be transferred to NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I pursuant to the Substitution. This transfer represents approximately 20% of the Existing Fund's total assets.

[92] Based on asset levels as of 3/31/09, approximately 0.8% of the Existing Fund's S Class assets will be transferred to NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I, representing approximately 0.1% of the Existing Fund's total assets, and approximately 11% of the Existing Fund's S Class assets will be transferred to NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class II pursuant to the Substitution, representing approximately 1% of the Existing Fund's total assets.

[93] ''Other Expenses'' include administrative services fees which currently are 0.15%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the

Continued

	Existing fund	Replacement fund
	Neuberger Berman Advisers Management Trust—AMT Partners Portfolio: I Class	NVIT—Neuberger Berman NVIT Multi Cap Opportunities Fund: Class I
Management Fees	0.84%	0.60%
12b–1 Fees	0.00%	0.00%
Other Expenses	0.11%	[93] 1.50%
Total Gross Expenses	0.95%	2.10%
Waivers/Reimbursements	[94] 0.00%	[95] 1.20%
Total Net Expenses	0.95%	0.90%
Fund/Class [96] Asset Level ($MMs) (5/20/09)	[97] $236.1	$2.9

16. Neuberger Berman Advisers Management Trust—AMT Regency Portfolio Replaced by NVIT—NVIT Multi-Manager Mid Cap Value Fund (Substitution Table Reference No. 30)

Neuberger Berman Advisers Management Trust—AMT Regency Portfolio: S Class will be replaced by NVIT—NVIT Multi-Manager Mid Cap Value Fund: Class II. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of Neuberger Berman Advisers Management Trust—AMT Regency Portfolio: S Class and NVIT—NVIT Multi-Manager Mid Cap Value Fund: Class II.

	Existing fund	Replacement fund
	Neuberger Berman Advisers Management Trust—AMT Regency Portfolio: S Class	NVIT—NVIT Multi-Manager Mid Cap Value Fund: Class II
Management Fees	0.85%	0.75%
12b–1 Fees	0.25%	0.25%
Other Expenses	0.13%	[98] 0.13%
Total Gross Expenses	1.23%	1.13%
Waivers/Reimbursements	[99] 0.00%	[100] 0.06%
Total Net Expenses	1.23%	1.07%
Fund/Class [101] Asset Level ($MMs) (5/20/09)	[102] $149.7	$124.9

full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 1.00%.

[94] Neuberger Berman Management LLC (''NBM'') has contractually undertaken to limit the Fund's expenses through December 31, 2012 by reimbursing the Fund for its total operating expenses (excluding the compensation of NBM, taxes, interest, extraordinary expenses, brokerage commissions and transaction costs) that exceed, in the aggregate, 1.00% per annum of the Fund's average daily net asset value. Because of the exclusion, the Fund's net expenses may exceed the contractual expense limitation. The Fund has contractually undertaken to reimburse NBM for the excess expenses paid by NBM, provided the reimbursements do not cause total operating expenses (exclusive of the compensation of NBM, taxes, interest, brokerage commissions, transaction costs and extraordinary expenses) to exceed an annual rate of 1.00%, and the reimbursements are made within three years after the year in which NBM incurred the expense. The figures in the table are based on last year's expenses.

[95] NVIT and NFA have entered into a written contract limiting operating expenses to 0.75% until May 1, 2010. This limit excludes certain Fund expenses, including interest, taxes, brokerage commissions, Rule 12b–1 fees, fees paid pursuant to an Administrative Services Plan, short sale dividend expenses, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived or reduced and/or for expenses previously paid by NFA, provided, however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

[96] Represents assets held by the fund or listed share class, as applicable.

[97] Based on asset levels as of 3/31/09, approximately 50% of the Existing Fund's assets will be transferred to the Replacement Fund pursuant to the Substitution.

[98] ''Other Expenses'' include administrative services fees which currently are 0.01%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 1.31%.

[99] Neuberger Berman Management LLC (''NBM'') has contractually agreed to reimburse certain expenses of the Fund through 12/31/2019, so that the total annual operating expenses are limited to 1.25% of the Fund's average daily net asset value. This arrangement does not cover interest, taxes, brokerage commissions, and extraordinary expenses; consequently, net expenses may exceed the contractual expense limitation. The Fund has agreed to repay NBM for expenses reimbursed to the Fund provided that repayment does not cause the Fund's annual operating expenses to exceed its expense limitation. Any such repayment must be made within three years after the year in which NBM incurred the expense. The figures in the table are based on last year's expenses.

[100] NVIT and NFA have entered into a written contract limiting operating expenses to 0.81% until at least May 1, 2010. This limit excludes certain Fund expenses, including interest, taxes, brokerage commissions, Rule 12b–1 fees, short-sale dividend expenses, fees paid pursuant to an Administrative Services Plan, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived or reduced and/or for expenses previously paid by NFA, provided, however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

[101] Represents assets held by the fund or listed share class, as applicable.

[102] Based on asset levels as of 3/31/09, approximately 7% of the Existing Fund's S Class assets will be transferred to the Replacement Fund pursuant to the Substitution. This transfer represents approximately 7% of the Existing Fund's total assets.

17. T. Rowe Price Equity Series, Inc.—T. Rowe Price Limited Term Bond Portfolio Replaced by NVIT—NVIT Short Term Bond Fund (Substitution Table Reference No. 31)

T. Rowe Price Equity Series, Inc.—T. Rowe Price Limited Term Bond Portfolio: Class II will be replaced by NVIT—NVIT Short Term Bond Fund: Class II. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of T. Rowe Price Equity Series, Inc.—T. Rowe Price Limited Term Bond Portfolio: Class II and NVIT—NVIT Short Term Bond Fund: Class II.

	Existing fund	Replacement fund
	T. Rowe Price Equity Series, Inc.—T. Rowe Price Limited Term Bond Portfolio: Class II	NVIT—NVIT Short Term Bond Fund: Class II
Management Fees	0.70%	0.35%
12b–1 Fees	0.25%	0.25%
Other Expenses	0.00%	[103] 0.32%
Total Gross Expenses	0.95%	0.92%
Waivers/Reimbursements	0.00%	[104] 0.02%
Total Net Expenses	0.95%	0.90%
Fund/Class [105] Asset Level ($MMs) (4/30/09)	[106] $73.5	$34.6

18. The Universal Institutional Funds, Inc.—Mid Cap Growth Portfolio Replaced by NVIT—NVIT Multi-Manager Mid Cap Growth Fund (Substitution Table Reference No. 32)

The Universal Institutional Funds, Inc.—Mid Cap Growth Portfolio: Class I will be replaced by NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of The Universal Institutional Funds, Inc.—Mid Cap Growth Portfolio: Class I and NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I.

	Existing fund	Replacement fund
	The Universal Institutional Funds, Inc.—Mid Cap Growth Portfolio: Class I	NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I
Management Fees	[107] 0.75%	0.75%
12b–1 Fees	0.00%	0.00%

[103] ''Other Expenses'' include administrative services fees which currently are 0.15%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 1.00%.

[104] NVIT and NFA have entered into a written contract limiting operating expenses to 0.50% for all share classes until May 1, 2010. This limit excludes certain Fund expenses, including interest, taxes, brokerage commissions, Rule 12b–1 fees, fees paid pursuant to an Administrative Services Plan, short sale dividend expenses, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived or reduced and/or for expenses previously paid by NFA, provided, however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

[105] Represents assets held by the fund or listed share class, as applicable.

[106] Based on asset levels as of 3/31/09, approximately 96% of the Existing Fund's Class II assets will be transferred to the Replacement Fund pursuant to the Substitution. This comprised approximately 31% of the Existing Fund's total assets.

[107] The Adviser is entitled to receive an advisory fee at an annual percentage of the Portfolio's average daily net assets as set forth in the table below:

First $500 million—0.75%

From $500 million to $1 billion—0.70%

More than $1 billion—0.65%

[108] ''Other Expenses'' include administrative services fees which currently are 0.07%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 1.07%.

[109] The Adviser has voluntarily agreed to reduce its advisory fee and/or reimburse the Portfolio so that Total Annual Portfolio Operating Expenses, excluding certain investment related expenses described below, will not exceed 1.05%. In determining the actual amount of voluntary advisory fee waivers and/or expense reimbursements for the Portfolio, if any, certain investment related expenses, such as foreign country tax expense and interest expense on amounts borrowed, are excluded from Total Annual Portfolio Operating Expenses. If these expenses were included, the Total Annual Portfolio Operating Expenses after voluntary fee waivers and/or expense reimbursements could exceed the expense ratio shown. For the fiscal year ended December 31, 2008, after giving effect to the Adviser's voluntary advisory fee waivers and/or expense reimbursements, the Total Annual Portfolio Operating Expenses incurred by investors were 1.05%. Fee waivers and/or expense reimbursements are voluntary and the Adviser reserves the right to terminate any waivers and/or reimbursements at any time and without notice.

[110] NVIT and NFA have entered into a written contract limiting operating expenses to 0.82% until at least May 1, 2010. This limit excludes certain Fund expenses, including any interest, taxes, brokerage commissions, Rule 12b–1 fees, fees paid pursuant to an Administrative Services Plan, short-sale dividend expenses, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived or reduced and/or for expenses previously paid by the NFA, provided however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

[111] Represents assets held by the fund or listed share class, as applicable.

[112] Based on asset levels as of 3/31/09, approximately 22% of the Existing Fund's Class I assets will be transferred to the Replacement Fund pursuant to the Substitution. This comprises approximately 7% of the Existing Fund's total assets.

	Existing fund	Replacement fund
	The Universal Institutional Funds, Inc.—Mid Cap Growth Portfolio: Class I	NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I
Other Expenses	0.31%	[108] 0.22%
Total Gross Expenses	1.06%	0.97%
Waivers/Reimbursements	[109] 0.00%	[110] 0.08%
Total Net Expenses	1.06%	0.89%
Fund/Class [111] Asset Level ($MMs) (5/20/09)	[112] $56.4	$87.7

19. The Universal Institutional Funds, Inc.—U.S. Real Estate Portfolio Replaced by NVIT—Van Kampen NVIT Real Estate Fund (Substitution Table Reference Nos. 33 & 34)

The Universal Institutional Funds, Inc.—U.S. Real Estate Portfolio: Class I will be replaced by NVIT—Van Kampen NVIT Real Estate Fund: Class I. The Universal Institutional Funds, Inc.—U.S. Real Estate Portfolio: Class II will be replaced by NVIT—Van Kampen NVIT Real Estate Fund: Class II. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of The Universal Institutional Funds, Inc.—U.S. Real Estate Portfolio: Class I, The Universal Institutional Funds, Inc.—U.S. Real Estate Portfolio: Class II, NVIT—Van Kampen NVIT Real Estate Fund: Class I and NVIT—Van Kampen NVIT Real Estate Fund: Class II.

	Existing fund		Replacement fund	
	The Universal Institutional Funds, Inc.—U.S. Real Estate Portfolio		NVIT—Van Kampen NVIT Real Estate Fund	
	Class I	Class II	Class I	Class II
Management Fees	[113] 0.77%	[113] 0.77%	0.70%	0.70%
12b–1 Fees	0.00%	0.35%	0.00%	0.25%
Other Expenses	0.30%	0.30%	[114] 0.74%	[114] 0.74%
Total Gross Expenses	1.07%	1.42%	1.44%	1.69%
Waivers/Reimbursements	0.00%	0.00%	[115] 0.44%	[115] 0.44%
Total Net Expenses	1.07%	1.42%	1.00%	1.25%
Fund/Class [116] Asset Level ($MMs) (5/20/09)	[117] $340.9	[118] $219.3	$3.8	$2.8

20. Van Eck Worldwide Insurance Trust—Worldwide Emerging Markets Fund Replaced by NVIT—Gartmore NVIT Emerging Markets Fund (Substitution Table Reference Nos. 35, 36, & 37)

Van Eck Worldwide Insurance Trust—Worldwide Emerging Markets Fund: Initial Class will be replaced by NVIT—Gartmore NVIT Emerging Markets Fund: Class I or Class III, depending on the contract involved in the Substitution. Van Eck Worldwide Insurance Trust—Worldwide Emerging Markets Fund: Class R1 will be replaced by NVIT—Gartmore NVIT Emerging Markets Fund: Class III. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of Van Eck Worldwide Insurance Trust—Worldwide Emerging Markets Fund: Initial Class, Van Eck Worldwide Insurance Trust—Worldwide Emerging Markets Fund: Class R1, NVIT—Gartmore NVIT Emerging Markets Fund: Class I and NVIT—Gartmore NVIT Emerging Markets Fund: Class III.

[113] The Adviser is entitled to receive an advisory fee at an annual percentage of the Portfolio's average daily net assets as set forth as follows: First $500 million 0.80%; from $500 million to $1 billion 0.75%; more than $1 billion 0.70%.

[114] ''Other Expenses'' include administrative services fees which currently are 0.15%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses would be 1.10% and 1.35%, respectively.

[115] NVIT and NFA have entered into a written contract limiting operating expenses to 0.85% until May 1, 2010. This limit excludes certain Fund expenses, including interest, taxes, brokerage commissions, Rule 12b–1 fees, fees paid pursuant to an Administrative Services Plan, short sale dividend expenses, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived or reduced and/or for expenses previously paid by NFA, provided, however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

[116] Represents assets held by the fund or listed share class.

[117] Based on asset levels as of 3/31/09, approximately 35% of the Existing Fund's Class I assets will be transferred to NVIT—Van Kampen NVIT Real Estate Fund: Class I pursuant to the Substitution. This comprises approximately 21% of the Existing Fund's total assets.

[118] Based on asset levels as of 3/31/09, approximately 13% of the Existing Fund's Class II assets will be transferred to NVIT—Van Kampen NVIT Real Estate Fund: Class II pursuant to the Substitution. This comprises approximately 5% of the Existing Fund's total assets.

	Existing fund		Replacement fund	
	Van Eck Worldwide Insurance Trust—Worldwide Emerging Markets Fund		NVIT—Gartmore NVIT Emerging Markets Fund	
	Initial Class	Class R1	Class I	Class III
Management Fees	1.00%	1.00%	[119] 0.95%	[119] 0.95%
12b–1 Fees	0.00%	0.00%	0.00%	0.00%
Other Expenses	0.29%	0.29%	[120] 0.28%	[121] 0.29%
Total Gross Expenses	1.29%	1.29%	1.23%	1.24%
Waivers/Reimbursements	[122] 0.00%	[122] 0.00%	[123] 0.00%	[123] 0.00%
Total Net Expenses	1.29%	1.29%	1.23%	1.24%
Fund/Class[124] Asset Level ($MMs) (5/20/09)	[125] $118.3	[126] $37.1	$36.0	$101.6

21. Wells Fargo Advantage Variable Trust—Wells Fargo Advantage VT Discovery Fund Replaced by NVIT—NVIT Multi-Manager Mid Cap Growth Fund (Substitution Table Reference Nos. 38 & 39)

Wells Fargo Advantage Variable Trust—Wells Fargo Advantage VT Discovery Fund will be replaced by NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I or Class II, depending on the contract involved in the Substitution. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of Wells Fargo Advantage Variable Trust—Wells Fargo Advantage VT Discovery Fund, NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I and NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class II.

[119] Management fees have been restated to reflect the elimination of a performance-based management fee and implementation of an asset-based management fee equal to the lowest possible management fee under the previous performance-based fee structure, as approved by the Board of Trustees on September 18, 2008. Under no circumstances, during a six-month transition period will the management fee under the new fee structure exceed what the Adviser would have received under the old structure assuming maximum penalty for underperformance.

[120] ''Other Expenses'' include administrative services fees which currently are 0.15%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses would be 1.33%.

[121] ''Other Expenses'' include administrative services fees which currently are 0.16%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses would be 1.33%.

[122] For the period May 1, 2009 through April 30, 2010, the Adviser contractually agreed to waive fees and reimburse certain operating expenses (excluding interest, dividends paid on securities sold short, trading expenses, taxes and extraordinary expenses) to the extent Total Annual Fund Operating Expenses exceed 1.50% of average daily net assets.

[123] NVIT and NFA have entered into a written contract limiting operating expenses to 1.20% for all share classes until at least May 1, 2010. This limit excludes certain Fund expenses, including interest, taxes, brokerage commissions, Rule 12b–1 fees, fees paid pursuant to an Administrative Services Plan, short sale dividend expenses, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived or reduced and/or for expenses previously paid by NFA provided, however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement. Currently, all share classes are operating below the expense limit.

[124] Represents assets held by the fund or listed share class, as applicable.

[125] Based on asset levels as of 3/31/09, approximately 0.3% of the Existing Fund's Initial Class assets will be transferred to NVIT—Gartmore NVIT Emerging Markets Fund: Class I, representing approximately 0.3% of the Existing Fund's total assets, and approximately 25% of the Existing Fund's assets will be transferred to NVIT—Gartmore NVIT Emerging Markets Fund: Class III, representing approximately 25% of the Existing Fund's total assets, pursuant to the Substitution.

[126] Based on asset levels as of 3/31/09, approximately 42% of the Existing Fund's Class R1 assets will be transferred to NVIT—Gartmore NVIT Emerging Markets Fund: Class III pursuant to the Substitution. This comprises approximately 10% of the Existing Fund's total assets.

[127] The following advisory fee schedule is charged to the Fund as a percentage of the Fund's average daily net assets: 0.75% for the first $500 million; 0.70% for the next $500 million; 0.65% for the next $2 billion; 0.625% for the next $2 billion; and 0.60% for assets over $5 billion.

[128] ''Other Expenses'' include administrative services fees which currently are 0.07%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 1.07% and 1.32%, respectively.

[129] The adviser has committed through April 30, 2010 to waive fees and/or reimburse expenses to the extent necessary to maintain the Fund's net operating expenses, excluding brokerage commissions, interest, taxes, extraordinary expenses and the expenses of any money market fund or other fund held by the Fund, do not exceed the net operating expense ratio of 1.15%.The committed net operating expense ratio may be increased only with approval of the Board of Trustees.

[130] NVIT and NFA have entered into a written contract limiting operating expenses to 0.82% for all share classes until at least May 1, 2010. This limit excludes certain Fund expenses, including any interest, taxes, brokerage commissions, Rule 12b–1 fees, fees paid pursuant to an Administrative Services Plan, short-sale dividend expenses, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived or reduced and/or for expenses previously paid by NFA, provided however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

[131] Represents assets held by the fund or listed share class, as applicable.

[132] Based on asset levels as of 3/31/09, approximately 29% of the Existing Fund's assets will be transferred to NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class I and approximately 0.02% of the Existing Fund's assets will be transferred to NVIT—NVIT Multi-Manager Mid Cap Growth Fund: Class II pursuant to the Substitution.

	Existing fund	Replacement fund	
	Wells Fargo Advantage Variable Trust—Wells Fargo Advantage VT Discovery Fund	NVIT—NVIT Multi-Manager Mid Cap Growth Fund	
		Class I	Class II
Management Fees	[127] 0.76%	0.75%	0.75%
12b–1 Fees	0.25%	0.00%	0.25%
Other Expenses	0.27%	[128] 0.22%	[128] 0.22%
Total Gross Expenses	1.28%	0.97%	1.22%
Waivers/Reimbursements	[129] 0.12%	[130] 0.08%	[130] 0.08%
Total Net Expenses	1.16%	0.89%	1.14%
Fund/Class[131] Asset Level ($MMs) (5/20/09)	[132] $112.7	$87.7	$134.2

22. Wells Fargo Advantage Variable Trust—Wells Fargo Advantage VT Opportunity Fund Replaced by NVIT—NVIT Multi-Manager Mid Cap Value Fund (Substitution Table Reference No. 40)

Wells Fargo Advantage Variable Trust—Wells Fargo Advantage VT Opportunity Fund: Investor Class will be replaced by NVIT—NVIT Multi-Manager Mid Cap Value Fund: Class II. The following chart compares the management fees, the total operating expenses (before and after any waivers and reimbursements) expressed as an annual percentage of average daily net assets, and the asset levels of Wells Fargo Advantage Variable Trust—Wells Fargo Advantage VT Opportunity Fund: Investor Class and NVIT—NVIT Multi-Manager Mid Cap Value Fund: Class II.

	Existing fund	Replacement fund
	Wells Fargo Advantage Variable Trust—Wells Fargo Advantage VT Opportunity Fund: Investor Class	NVIT—NVIT Multi-Manager Mid Cap Value Fund: Class II
Management Fees	[133] 0.76%	0.75%
12b–1 Fees	0.25%	0.25%
Other Expenses	0.22%	[134] 0.13%
Total Gross Expenses	1.23%	1.13%
Waivers/Reimbursements	[135] 0.14%	[136] 0.06%
Total Net Expenses	1.09%	1.07%
Fund/Class [137] Asset Level ($MMs) (5/20/09)	[138] $404.3	$124.9

[133] The following advisory fee schedule is charged to the Fund as a percentage of the Fund's average daily net assets:

0.75% for the first $500 million;

0.70% for the next $500 million;

0.65% for the next $2 billion;

0.625% for the next $2 billion; and

0.60% for assets over $5 billion.

[134] ''Other Expenses'' include administrative services fees which currently are 0.01%, but which are permitted to be as high as 0.25%. The full 0.25% in administrative services fees is not reflected in ''Other Expenses'' at this time because, until at least May 1, 2010, the Fund does not intend to pay insurance companies a higher amount. If the full amount of administrative services fees were charged, total operating expenses (after fee waivers/expense reimbursements) would be 1.31%.

[135] The adviser has committed through April 30, 2010, to waive fees and/or reimburse expenses to the extent necessary to ensure that the Fund's net operating expenses, excluding brokerage commissions, interest, taxes, extraordinary expenses and the expenses of any money market fund or other fund held by the Fund, do not exceed the net operating expense ratio of 1.07%.The committed net operating expense ratio may be increased only with approval of the Board of Trustees.

[136] NVIT and NFA have entered into a written contract limiting operating expenses to 0.81% for all share classes until at least May 1, 2010. This limit excludes certain Fund expenses, including interest, taxes, brokerage commissions, Rule 12b-1 fees, short-sale dividend expenses, fees paid pursuant to an Administrative Services Plan, other expenditures which are capitalized in accordance with generally accepted accounting principles and other non-routine expenses not incurred in the ordinary course of the Fund's business. NVIT is authorized to reimburse NFA for management fees previously waived or reduced and/or for expenses previously paid by NFA, provided, however, that any reimbursements must be paid at a date not more than three years after the fiscal year in which NFA waived the fees or reimbursed the expenses and the reimbursements do not cause the Fund to exceed the expense limitation in the agreement.

[137] Represents assets held by the fund or listed share class, as applicable.

[138] Based on asset levels as of 3/31/09, approximately 53% of the Existing Fund's assets will be transferred to the Replacement Fund pursuant to the Substitution.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60108; File No. PCAOB–2008–05]

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules on Succeeding to the Registration Status of a Predecessor Firm

June 12, 2009.

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the ''Act''), notice is hereby given that on August 4, 2008, the Public Company Accounting Oversight Board (the ''Board'' or the ''PCAOB'') filed with the Securities and Exchange Commission (the ''Commission'' or ''SEC'') the proposed rules described in Items I and II below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rules from interested persons.

I. Board's Statement of the Terms of Substance of the Proposed Rules

On July 29, 2008, the Board adopted rules and a form related to succeeding to the registration status of a predecessor firm. New PCAOB Rules 2108–2109 and the instructions to a new form, Form 4, are set out below.

Section 2. Registration and Reporting

Part 1—Registration of Public Accounting Firms

* * * * *

2108. Succeeding to the Registration Status of a Predecessor

(a) In the event that a registered public accounting firm changes its form of organization or changes the jurisdiction under the law of which it is organized, in circumstances that do not involve an acquisition or combination as described in paragraph (b) of this Rule, the entity in its new form shall succeed to the registration status of the predecessor if the new entity is a public accounting firm and files a Form 4 in accordance with Rule 2109.

(b) In the event that a registered public accounting firm is acquired by an entity that is not a registered public accounting firm, or combines with any other entity or entities to form a new legal entity—

(1) If the acquiring entity or the new entity is a public accounting firm that files a Form 4 in accordance with Rule 2109, and the answer provided to each subpart of Item 3.2.e of that Form 4 is ''no,'' that entity shall succeed to the registration status of the registered firm;

(2) If the acquiring entity or the new entity is a public accounting firm that files a Form 4 in accordance with Rule 2109, and the answer provided to any subpart of Item 3.2.e of that Form 4 is other than ''no,'' that entity shall not succeed to the registration status of the registered firm; provided, however, that if that entity represents on Form 4 that it has filed, or that it intends to file within 45 days of the effective date of the acquisition or combination, an application for registration on Form 1, then—

(i) Subject to the qualifications in subparagraphs (ii), (iii), and (iv), that entity shall temporarily succeed to the registration status of the registered firm for a transitional period, but that registration will cease to be effective on the earlier of the date that the entity's application on Form 1 is approved or the date that is 91 days after the effective date of the acquisition or combination as reported on Form 4;

(ii) Subject to the qualifications in subparagraphs (iii) and (iv), if the acquisition or combination took effect before the effective date of this rule, that entity shall temporarily succeed to the registration status of the registered firm for a transitional period, but that registration will cease to be effective on the earlier of the date that the entity's application on Form 1 is approved or the date that is 91 days after the effective date of this rule;

(iii) if the Board requests additional information from the entity pursuant to Rule 2106(c) with less than 60 days remaining in the original transitional period, the entity's temporary succession to registration status shall continue to the date that is 60 days after the date of the Board's request; and

(iv) If, after the original transition period has been extended pursuant to subparagraph (iii), the Board makes any further requests for additional information from the entity pursuant to Rule 2106(c), the Board may in its discretion extend the temporary succession to registration status for such finite period as the Board shall specify.

(c) Subject to paragraph (d) of this rule, a public accounting firm that results from events described in paragraphs (a) or (b) of this rule shall not, in the absence of compliance with the provisions of Rule 2109, succeed to the registration status of a predecessor registered public accounting firm.

(d) Notwithstanding paragraph (c) of this rule, if a public accounting firm's failure to comply with the provisions of Rule 2109 is solely a failure concerning the timeliness of the submission, the firm may request leave to file Form 4 out of time by indicating and supporting that request in accordance with the instructions to the form. The Board will evaluate any such request in light of the relevant facts and circumstances and the public interest and may, in its discretion, grant or deny the request. If the Board grants leave to file the form out of time, the Form 4 shall be deemed filed and the provisions of paragraphs (a) and (b) shall apply as if the Form 4 had been timely filed. A Form 4 that has been submitted out of time may be withdrawn by the firm at any time before the Board has approved or disapproved the request for leave to file out of time.

2109. Procedure for Succeeding to the Registration Status of a Predecessor

(a) A public accounting firm seeking to succeed to the registration status of a predecessor registered public accounting firm pursuant to the provisions of Rule 2108 must do so by filing a Form 4—

(1) No later than the 14th day after the change or business combination takes effect, if the change or business combination takes effect on or after [insert effective date of this rule]; or

(2) No later than [insert date 14 days after effective date of this rule], if the change or business combination took effect before [insert effective date of this rule].

(b) A public accounting firm filing a Form 4 must do so by filing the Form 4 in accordance with the instructions to that form. Unless directed otherwise by the Board, a public accounting firm filing a Form 4 must file the Form 4 and exhibits thereto electronically with the Board through the Board's Web-based system.

(c) A Form 4 shall be deemed to be filed on the date that the public accounting firm submits a Form 4 in accordance with Rule 2109(b) that includes the signed certification required in Part V of Form 4, *provided, however,* that any report so submitted after the applicable deadline as prescribed in paragraph (a) of this rule, shall not be deemed filed unless and until the Board, pursuant to Rule 2108(d), grants leave to file the Form 4 out of time.

(d) The provisions of Rule 2204 concerning signatures, shall apply to each signature required by Form 4 as if it were a signature to a report on Form 3. Rule 2205 concerning amendments, and Rule 2207 concerning assertions of conflicts with non-U.S. laws, shall apply to any submission on Form 4 as if the submission were a report on Form.

Form 4—Succeeding to Registration Status of Predecessor

General Instructions

1. *Purpose of This Form.* Effective [insert effective date of Rule 2109], this Form must be used to submit information, representations, and affirmations to the *Board,* pursuant to Rule 2109, by a *public accounting firm* that seeks to succeed to the registration status of a predecessor firm in circumstances described in Rule 2108.

2. *Defined Terms.* The definitions in the *Board's rules* apply to this Form. Italicized terms in the instructions to this Form are defined in the *Board's rules.* In addition, as used in the instructions to this Form, the term ''the Firm'' means the *public accounting firm* that is submitting this Form to the *Board,* and the term ''the predecessor firm'' means the *registered public accounting firm* identified in Item 1.1.a of the Form.

3. *Submission of this Form.* Unless otherwise directed by the *Board,* the Firm must submit this Form, and all exhibits to this Form, to the *Board* electronically by completing the Web-based version of this Form available on the *Board's* Web site. The Firm must use the predecessor firm's user ID and password to access the system and submit the Form. In the event of a transaction involving the combination of multiple registered public accounting firms, the Firm must access the system using only the user ID and password of the firm specifically identified in Item 1.1.a, and not those of any other registered public accounting firm.

4. *When This Form Should Be Submitted and When It Is Considered Filed.* To succeed to the registration status of the predecessor firm pursuant to the provisions of Rule 2108(a) or (b), the Firm must provide the information and representations required by this Form, in accordance with the instructions to this Form, and must file the Form no later than the 14th day after the effective date of the change in form of organization, change in jurisdiction of organization, or business combination. Different timing requirements apply with respect to events that occurred before [insert effective date of Rule 2109]. *See* Rule 2109(a)(2). Form 4 is considered filed when the Firm has submitted to the *Board,* through the *Board's* Web-based reporting system, a Form 4 that includes the signed certification required in Part V of Form 4, *provided, however,* that any Form 4 so submitted after the applicable filing deadline shall not be deemed filed unless and until the *Board,* pursuant to Rule 2108(d), grants leave to file the Form 4 out of time.

5. *Seeking Leave To File This Form Out of Time.* To request leave to file Form 4 out of time, pursuant to the provisions of Rule 2108(d), the Firm must file the request on Form 4 and must attach as Exhibit 99.5 a detailed statement describing why, despite the passage of time since the event described on the Form 4, the *Board* should permit the Firm to succeed to the registration status of the predecessor firm. Any Form 4 that has been submitted out of time, and as to which a *Board* decision on whether to allow the form to be filed is pending, may be withdrawn by accessing the pending submission in the *Board's* Web-based system and selecting the ''Withdraw'' option.

6. *Completing the Form.* The Firm must complete Parts I, II, IV and V of this Form. Part III should be completed to the extent applicable, as described more fully in the instructions to Part II of the Form.

7. *Amendments to This Form.* Amendments shall not be submitted to update information into a Form 4 that was correct at the time the Form was submitted, but only to correct information that was incorrect at the time the Form was submitted or to provide information that was omitted from the Form and was required to be provided at the time the Form was submitted. When submitting a Form 4 to amend an earlier submitted Form 4, the Firm must supply not only the corrected or supplemental information, but must include in the amended Form 4 all information, affirmations, and certifications that were required to be included in the original Form 4. The Firm may access the originally filed Form 4 through the *Board's* Web-based system and make the appropriate amendments without needing to re-enter all other information. (Note that, pursuant to Rule 2109(d), the provisions of Rule 2205 concerning amendments apply to any submission on this Form as if the submission were a report on Form 3.)

Note: The *Board* will designate an amendment to a report on Form 4 as a report on ''Form 4/A.''

Note: Any change to a Form 4 that was originally submitted out of time, and as to which a *Board* decision on whether to allow the form to be filed is pending, shall not be treated as an amendment. To make a change to any such pending Form 4 submission, the Firm must access the pending submission in the *Board's* Web-based system, select the ''Withdraw and Replace'' option, and submit a new completed Form 4 in place of the previously pending submission. The certification required in Part V of the new submission must be executed specifically for the replacement version of the Form and dated accordingly.

8. *Rules Governing This Form.* In addition to these instructions, the *rules* contained in Part 2 of Section 2 of the *Board's rules* govern this Form. Please read these *rules* and the instructions carefully before completing this Form.

9. *Requests for Confidential Treatment.* The Firm may, by marking the Form in accordance with the instructions provided, request confidential treatment of any information submitted in Exhibit 99.3 or Exhibit 99.5 of this Form that has not otherwise been publicly disclosed and that either contains information reasonably identified by the Firm as proprietary information or that is protected from public disclosure by applicable laws related to confidentiality of proprietary, personal, or other information. See Rule 2300. If the Firm requests confidential treatment, it must identify the information in Exhibit 99.3 or Exhibit 99.5 that it desires to keep confidential, and include, as Exhibit 99.1 to this Form, an exhibit that complies with the requirements of Rule 2300(c)(2). The *Board* will determine whether to grant confidential treatment requests on a case-by-case basis. If the Firm fails to include Exhibit 99.1, or includes an Exhibit 99.1 that fails to comply with Rule 2300(c)(2), the request for confidential treatment may be denied solely on the basis of that failure.

10. *Assertions of Conflicts With Non-U.S. Law.* If the Firm is a foreign registered public accounting firm, the Firm may, unless otherwise directed by the *Board* pursuant to Rule 2207(e), decline to provide the affirmation required by Item 4.1 of this Form and any answer required by Item 3.2.e of this Form if doing so would constitute a violation of non-U.S. law by the Firm and the Firm proceeds in accordance with Rule 2207. (Note that, pursuant to Rule 2109(d), the provisions of Rule 2207 apply to any submission on this Form as if the submission were a report on Form 3.) If the firm withholds the affirmation or answer, the Firm must indicate, in accordance with the instructions in the relevant Part of the Form, that it has done so.

11. *Language.* Information submitted as part of this Form, including any exhibit to this Form, must be in the English language.

Part I—Identity of the Firm and Contact Persons

Item 1.1 Names of Firm and Predecessor Registered Public Accounting Firm

a. State the legal name of the registered public accounting firm to whose registration status the Firm seeks to succeed.

Note: The name provided in Item 1.1.a should be the legal name of the registered public accounting firm as last reported to the *Board* on Form 1 or Form 3. This is the firm referred to in this Form as ''the predecessor firm.'' In accessing and submitting this Form through the *Board*'s Web-based system, the Firm must use the predecessor firm's user ID and password.

b. State the legal name of the Firm filing this Form.

Note: The name provided in Item 1.1.b will be the name under which the Firm is registered with the *Board* if this Form is filed in accordance with Rule 2109.

c. If different than the name provided in Item 1.1.b, state the name or names under which the Firm issues or intends to issue *audit reports.*

Item 1.2 Contact Information of the Firm

a. State the physical address (and, if different, mailing address) of the Firm's headquarters office.

b. State the telephone number and facsimile number of the Firm 's headquarters office. If available, state the Web site address of the Firm.

Item 1.3 Primary Contact and Signatory

State the name, business title, physical business address (and, if different, business mailing address), business telephone number, business facsimile number, and business e-mail address of a partner or authorized officer of the Firm who will serve as the Firm's primary contact with the *Board,* including for purposes of this Form 4, any annual reports filed on Form 2, and any special reports filed on Form 3.

Part II—General Information Concerning the Filing of This Form

Item 2.1 Reason for Filing This Form

Indicate, by checking the box for either Item a or Item b below, the reason the Firm is filing this Form. Then proceed to the Parts and Items of this Form indicated parenthetically for the relevant item and provide the information described there. Provide responses only to those Parts and Items of the Form specifically indicated for the event or events that the Firm identifies in this Part II as the reason for filing this Form. (For example, if the Form is being submitted because the Firm has changed its form of organization, check the box for Item 2.1.a, and complete only Item 3.1 and Parts IV and V of the Form. Complete Item 2.2 or Item 2.3 if applicable.)

a. There has been a change in the Firm's form of organization, or the Firm has changed the jurisdiction under the law of which it is organized. (Complete Item 3.1, Part IV, and Part V; complete Item 2.2 or Item 2.3 if applicable.)

b. There has been an acquisition of a registered public accounting firm by an entity that was not a registered public accounting firm at the time of the acquisition, or a registered public accounting firm has combined with another entity or other entities to form a new legal entity. (Complete Item 3.2, Part IV, and Part V; complete Item 2.2 or Item 2.3 if applicable.)

Item 2.2 Request for Leave To File This Form Out of Time

If this Form is not submitted in accordance with Rule 2109(b) on or before the filing deadline set by Rule 2109(a), the Firm may request leave to file this Form 4 out of time by checking the box for this Item, completing this Form 4 as is otherwise required, and providing, as Exhibit 99.5 to this Form, a description of the reason(s) the Form was not timely filed and a statement of the grounds on which the Firm asserts that the *Board* should grant leave to file the Form out of time.

Note: Requests for leave to file Form 4 out of time are not automatically granted. See Rule 2108(d).

Item 2.3 Amendments

If this is an amendment to a Form 4 previously filed with the *Board*—

a. Indicate, by checking the box corresponding to this item, that this is an amendment; and

b. Identify the specific Item numbers of this Form (other than this Item 2.3) as to which the Firm's response has changed from that provided in the most recent Form 4 or amended Form 4 filed by the Firm with respect to the event reported on this Form.

Part III—Changes in the Firm

Item 3.1 Changes in Form of Organization or in Relevant Jurisdiction

If this Form 4 is being submitted in connection with a change in the Firm's form of organization or a change in the jurisdiction under the law of which the Firm is organized—

a. State the Firm's current (*i.e.,* after the change in legal form or jurisdiction) legal form of organization;

b. Identify the jurisdiction under the law of which the Firm is organized currently (*i.e.,* after the change in legal form or jurisdiction);

c. State the date that the change took effect;

d. Affirm that, after the change reported or described in this Item 3.1, the Firm is a *public accounting firm* under substantially the same ownership as the predecessor firm;

Note: Neither the Act nor *Board rules* include any provision by which a *registered public accounting firm* may, in effect, transfer its *Board* registration to another entity. Rule 2108(a), in conjunction with this Form, allows the succession of registration status in circumstances in which a *registered public accounting firm* changes its legal form of organization while remaining under substantially the same ownership. For purposes of this Item, the Firm is considered to be under substantially the same ownership as the predecessor firm if a majority of the persons who held an equity ownership interest in the predecessor also constitute a majority of the persons who hold an equity ownership interest in the Firm.

e. If, in connection with the change described in this Item 3.1, the Firm has obtained, or will practice under, a license or certification number, authorizing it to engage in the business of auditing or accounting, that is different from any such license or certification number previously reported to the *Board* by the predecessor firm, provide as to each such license—

1. The name of the issuing *State,* agency, board, or other authority;

2. The number of the license or certification; and

3. The date the license or certification took effect;

f. If, in connection with the change described in this Item 3.1, any license or certification that authorized the predecessor firm to engage in the business of auditing or accounting has ceased to be effective or has become subject to any conditions or contingencies other than conditions or contingencies imposed on all firms engaged in the business of auditing or accounting in the jurisdiction, provide, as to each such license—

1. The name of the issuing *State,* agency, board, or other authority;

2. The number of the license or certification; and

3. The date that the authorization ceased to be effective or became subject to conditions or contingencies.

Item 3.2 Acquisitions of, or Combinations Involving, A *Registered Public Accounting Firm*

a. If this Form 4 is being submitted in connection with a transaction concerning which a person who holds

an equity ownership interest in the Firm, or is employed by the Firm, can certify the points set out in Item 3.2.b. and Exhibit 99.4,—

1. Provide the name of each entity, other than the predecessor firm, that was involved in the transaction and that was a *registered public accounting firm* immediately before the transaction, and as to each such entity—

(i) Affirm that the entity has filed with the *Board* a request for leave to withdraw from registration on Form 1–WD; and

(ii) State the date that the entity filed Form 1–WD;

2. Provide the name of each entity, including any acquiror, that was involved in the transaction and that was not a *registered public accounting firm* immediately before the transaction;

3. Provide the date that the transaction took effect; and

4. Provide a brief description of the nature of the transaction.

b. Provide as Exhibit 99.4 to this Form, a statement in the form set out below, signed by a person who, immediately before the transaction, was an officer of, or held an equity ownership interest in, the predecessor firm and who now either holds an equity ownership interest in, or is employed by, the Firm. The statement must be submitted on behalf of the Firm. Exhibit 99.4 must include a signature that appears in typed form in the electronic submission and a corresponding manual signature retained by the Firm in accordance with Rule 2109(d). The signature must be accompanied by the signer's current title, the signer's title immediately before the event described in Item 3.2.a, the date of signature, and the signer's business mailing address, business telephone number, business facsimile number, and business e-mail address. Other than the insertion of the relevant names, Exhibit 99.4 must be in the exact following words—

On behalf of [name of the Firm], I certify that (1) I was an officer of, or held an equity ownership interest in, [name of predecessor firm] immediately before the transaction described in Item 3.2.a of the Form 4 to which this exhibit is attached; (2) immediately before that transaction [name of predecessor firm] was a *registered public accounting firm;* (3) as part of that transaction, a majority of the persons who held equity ownership interests in [name of predecessor firm] obtained equity ownership interests in, or became employed by, [name of the Firm]; (4) [name of predecessor firm] intended that [name of the Firm] succeed to the *Board* registration status of [name of predecessor firm] to the extent permitted by the *Board's* rules; and (5) [name of predecessor firm] is no longer a *public accounting firm.*

c. If, in connection with the transaction described in Item 3.2.a, the Firm has obtained, or will practice under, a license or certification number, authorizing it to engage in the business of auditing or accounting, that is different from any such license or certification number previously reported to the *Board* by the predecessor firm, provide, as to each such license—

1. The name of the issuing *State,* agency, board or other authority;

2. The number of the license or certification; and

3. The date the license or certification took effect.

d. If, in connection with the transaction described in Item 3.2.a, any license or certification that authorized the predecessor firm to engage in the business of auditing or accounting has ceased to be effective or has become subject to any conditions or contingencies other than conditions or contingencies imposed on all firms engaged in the business of auditing or accounting in the jurisdiction, provide, as to each such license—

1. The name of the issuing *State,* agency, board, or other authority;

2. The number of the license or certification; and

3. The date that the authorization ceased to be effective or became subject to conditions or contingencies.

e. Provide a ''yes'' or ''no'' answer to each of the following questions—

1. Is there identified in Item 3.2.a.2 any entity that, if it were filing an application for registration on Form 1 on the date of the certification in Part V of this Form, would have to provide an affirmative response to Item 5.1.a of Form 1 in order to file a complete and truthful Form 1?

Note: In considering whether an affirmative response would be required to Item 5.1.a of Form 1, the Firm should take into account the guidance provided by question number 33 in Frequently Asked Questions Regarding Registration with the *Board,* PCAOB Release No. 2003–011A (Nov. 13, 2003).

2. Is there identified in Item 3.2.a.2 any entity that (i) issued an *audit report* with respect to an *issuer* on or after October 22, 2003 (or, if the entity is a non-U.S. entity, July 19, 2004), while not registered with the *Board,* and (ii) has never had an application for registration on Form 1 approved by the *Board*?

3. Is the Firm operating without holding any license or certification issued by a *State,* agency, board, or other authority authorizing the Firm to engage in the business of auditing or accounting?

Note: If the Firm answers ''yes'' to any question in Item 3.2.e or asserts as to any of those questions that non-U.S. law prohibits it from providing an answer, the Firm cannot succeed outright to the registration of the predecessor. If this Form 4 is submitted in accordance with Rule 2109, however, the Firm will temporarily succeed to the registration of the predecessor for a transitional period as described in Rule 2108(b)(2) as long as the Firm makes the representation required in Item 3.2.f below. If the Firm answers ''yes'' to any question in Item 3.2.e or asserts as to any of those questions that non-U.S. law prohibits it from providing an answer but fails to make the representation required in Item 3.2.f, this Form 4 will not be accepted for filing and the Firm will not succeed to the predecessor's registration even on a temporary basis. *See* Rule 2108(b)(2).

f. If the Firm answered ''yes'' to any question in Item 3.2.e or asserts as to any of those questions that non-U.S. law prohibits it from providing an answer, affirm, by checking the box corresponding to the appropriate item, that one of the following statements is true—

1. The Firm has filed an application for registration on Form 1 on or after the date provided in Item 3.2.a.3.

2. The Firm intends to file an application for Registration on Form 1 no later than 45 days after the date provided in Item 3.2.a.3.

Part IV—Continuing Obligations

Item 4.1 Continuing Consent to Cooperate

Affirm that—

a. The Firm consents to cooperate in and comply with any request for testimony or the production of documents made by the *Board* in furtherance of its authority and responsibilities under the Sarbanes-Oxley Act of 2002;

b. The Firm has secured from each of its *associated persons,* and agrees to enforce as a condition of each such person's continued employment by or other association with the Firm, a consent indicating that the *associated person* consents to cooperate in and comply with any request for testimony or the production of documents made by the *Board* in furtherance of its authority under the Sarbanes-Oxley Act of 2002, and that the *associated person* understands and agrees that such consent is a condition of his or her continued employment by or other association with the Firm; and

c. The Firm understands and agrees that cooperation and compliance, as

described in Item 4.1.a., and the securing and enforcing of consents from its *associated persons* as described in Item 4.1.b., is a condition to the continuing effectiveness of the registration of the Firm with the *Board.*

Note: The affirmation in Item 4.1.b. shall not be understood to include an affirmation that the Firm has secured such consents from any *associated person* that is a *registered public accounting firm.*

Note: The affirmation in Item 4.1.b. shall not be understood to include an affirmation that the Firm has secured such consents from any *associated person* that is a *foreign public accounting firm* in circumstances where that *associated person* asserts that non-U.S. law prohibits it from providing the consent, so long as the Firm possesses in its files documents relating to the *associated person's* assertion about non-U.S. law that would be sufficient to satisfy the requirements of subparagraphs (2) through (4) of Rule 2207(c) if that *associated person* were a *registered public accounting firm* filing a Form 2 and withholding this affirmation. This exception to the affirmation in Item 4.1.b. does not relieve the Firm of its obligation to enforce cooperation and compliance with *Board* demands by any such *associated person* as a condition of continued association with the Firm.

Note: If the Firm is a *foreign registered public accounting firm,* the affirmations in Item 4.1 that relate to *associated persons* shall be understood to encompass every *accountant* who is a proprietor, partner, principal, shareholder, officer, or manager of the Firm and who provided at least ten hours of *audit services* for any *issuer* during the reporting period.

Item 4.2 Continuing Responsibility to the *Board* for Previous Conduct

Affirm that, for purposes of the *Board's* authority with respect to *registered public accounting firm*s, including but not limited to the authority to require reporting of information and the authority to impose disciplinary sanctions, the Firm either has retained or assumes responsibility for the conduct of any predecessor *registered public accounting firm* before the change or business combination reported on this Form took effect.

Note: As used in Item 4.2 the term ''predecessor *registered public accounting firm,''* means (1) in circumstances not involving a transaction described in Item 3.2, the predecessor firm and (2) in circumstances involving a transaction described in Item 3.2, each *registered public accounting firm* that was involved in the business combination.

Note: The continuing responsibility in Item 4.2 includes, among other things, responsibility for reporting information on Form 2 and events on Form 3. Thus, for example, if a *registered public accounting firm* experienced a Form 3 reportable event before the event that is the subject of this Form, the Firm, as successor, has the obligation to report that event on Form 3, and bears responsibility for any failure by any predecessor to have filed a timely Form 3 to report the matter.

Note: The *Board's rules* do not require that any entity retain or assume responsibility as set forth above. In the absence of an affirmation that it retains or assumes responsibility for such conduct at least for purposes of the *Board's* authority, however, an entity cannot succeed to the *Board* registration status of any predecessor entity. *See* Rule 2108.

Part V—Certification of the Firm

Item 5.1 Signature of Partner or Authorized Officer

This Form must be signed on behalf of the Firm by an authorized partner or officer of the Firm including, in accordance with Rule 2109(d), both a signature that appears in typed form within the electronic submission and a corresponding manual signature retained by the Firm. The signer must certify that—

a. The signer is authorized to sign this Form on behalf of the Firm;

b. The signer has reviewed this Form;

c. Based on the signer's knowledge, this Form does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading; and

d. Either—

1. Based on the signer's knowledge, the Firm has not failed to include in this Form any information or affirmation that is required by the instructions to this Form, with respect to the event or events being described on this Form, or

2. Based on the signer's knowledge—

(A) The Firm is a *foreign public accounting firm* and has not failed to include in this Form any information or affirmation that is required by the instructions to this Form other than an affirmation required by Item 4.1 and/or an answer to Item 3.2.e.; and

(B) The Firm asserts that it is prohibited by non-U.S. law from providing any such withheld affirmation or response to the Board on this Form and, with respect to each such withheld affirmation or response, the Firm has made the efforts described in PCAOB Rule 2207(b) and has in its files the materials described in PCAOB Rule 2207(c).

The signature must be accompanied by the signer's title, the capacity in which the signer signed the Form, the date of signature, and the signer's business mailing address, business telephone number, business facsimile number, and business e-mail address.

Part VI—Exhibits

To the extent applicable under the foregoing instructions, each report must be accompanied by the following exhibits:

Exhibit 99.1 Request for Confidential Treatment

Exhibit 99.3 Materials Required by Rule 2207(c)(2)–(4)—*Submit Only as an Exhibit to an Amended Form 4 in Response to a Request Made Pursuant to Rule 2207(d)*

Exhibit 99.4 Acknowledgment Concerning Registration Status in Certain Transactions

Exhibit 99.5 Statement in Support of Request for Leave To File Form 4 Out of Time.

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rule. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

(a) Purpose

Under Section 102(a) of the Sarbanes-Oxley Act of 2002 and PCAOB Rule 2100, a public accounting firm must be registered with the PCAOB in order to prepare or issue audit reports for public companies or to play a substantial role in the preparation or furnishing of such audit reports. To become registered, a public accounting firm files an application for registration on PCAOB Form 1, which the Board may approve or disapprove. The proposed rules identify the circumstances in which a firm may succeed to the registration status of a predecessor registered firm, without filing a new Form 1, and provide a mechanism for the firm to do so.

The rules afford the opportunity for continuity of registration in two general categories of circumstances: (1) Changes related to a firm's legal form of organization or the jurisdiction in which it is organized, and (2) transactions in which a registered firm is acquired by an unregistered entity or combines with other entities to form a new legal entity. The events to which the rules apply are

events for which a firm plans, not unanticipated events to which a firm reacts. The rules are designed to facilitate a firm's ability to factor into its planning, and to predict with certainty, whether and how continuity of registration can be maintained.

The rules provide for a form the firm must file (Form 4), set a deadline for filing the form, and require certain information and representations in the form. If the firm files the form within the required timeframe, provides the required representations, and certifies that all required information is included, then continuity of registration is automatic, without the need for separate Board action. The rules and form also build in safeguards to ensure that the Form 1 process is not circumvented in circumstances where that process is more appropriate than Form 4 succession.

To obtain continuing effectiveness of an existing registration, the firm must acknowledge the continuity of, and commit to honor, certain obligations that accompany the registration status. Those obligations fall into two categories: continuing consent to cooperate with the Board and continuing responsibility to the Board for the conduct of predecessor registered firms.

With respect to circumstances in which a registered firm is acquired by an unregistered entity, or when a registered firm combines with other entities to form a new legal entity, the proposed Form 4 requires, among other things, information that determines whether succession to the predecessor's registration is permanent or temporary. Based on this information, succession may be outright and permanent or may only be temporary for a transition period intended to allow to the firm to seek registration through the Form 1 process.

For succession to registration to take effect automatically upon filing under the rules, Form 4 must be filed within 14 days after the effective date of the change in legal form or other event. The rules make some allowance for late filing. A firm that fails to file Form 4 within the 14-day period may submit a late Form 4 and request that the Board grant leave to file the form out of time. In a late submission, the firm should include as an exhibit to the form a statement in support of its request for leave to file out of time. If the Board grants the request and allows the form to be filed, the firm will succeed to the predecessor's registration.

The proposed rules would take effect 60 days after Securities and Exchange Commission approval.

(b) Statutory Basis

The statutory basis for the proposed rule is Title I of the Act.

B. Board's Statement on Burden on Competition

The Board does not believe that the proposed rules will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rules provide a registration succession mechanism that firms may elect to use but are not required to use.

C. Board's Statement on Comments on the Proposed Rules Received from Members, Participants or Others

The Board released the proposed rules and form instructions for public comment in Release No. 2006–005 (May 23, 2006). A copy of Release No. 2006–005 and the comment letters received in response to the PCAOB's request for comment are available on the PCAOB's Web site at *http://www.pcaobus.org.* The Board received five written comment letters. The Board has clarified and modified certain aspects of the proposed rules and form instructions in response to the comments it received, as discussed below.

Commenters addressed the Form 4 item that requires a Form 4 filer to affirm that it retains or assumes responsibility for the conduct of predecessor registered firms for purposes of the Board's authority. Commenters expressed concern that the affirmation might erode otherwise valid legal defenses in contexts such as criminal or private civil proceedings, and suggested that the Board should make clear that no such result is intended. The Board reiterates what it said in proposing the requirement for comment: The affirmation of continuing responsibility for a predecessor's conduct is not intended to create any new liability, nor is it intended to affect the legal consequences of the transaction with respect to any person or entity other than the Board. As between the firm and the Board, however, the Board views the affirmation as indispensable if a firm wishes to make use of the Form 4 process. In an effort to reduce the possibility of misunderstanding about the intended scope, the Board has made slight changes to the wording of Item 4.2—such as changing the heading to specify that the item is about continuing responsibility ''to the Board,'' and removing the broad adjective ''legal'' in describing the nature of the responsibility being retained or assumed—but the Board is adopting the substance of the requirement essentially as proposed.

One commenter expressed the view that a successor firm should not be precluded from assuming a predecessor firm's registration status just because less than a majority of its predecessor's owners remained with the successor firm. In the Board's view, that suggestion is unworkable for a process intended to provide for automatic succession upon the satisfaction of bright line criteria. Without supplemental information and the intervention of judgment, the Board could not provide for succession in those circumstances without running a risk that more than one ''successor'' entity might lay claim to the same predecessor's registration.

One commenter suggested that the Board should define ''acquisition'' in this context, and raised questions concerning whether, to be an ''acquisition'' for which Form 4 succession is available, the transaction must involve acquisition of the predecessor firm's assets or a substantial portion thereof. For Form 4 succession to be available, the Board does not require that the transaction include anything other than what is described in the Exhibit 99.4 certification: a majority of the equity owners in a predecessor registered firm have become equity owners or employees of an unregistered firm, and the predecessor registered firm ceases to be a public accounting firm. For clarity on this point, the wording of Item 3.2.a. has been revised to refer to an acquisition of ''any portion of'' a registered public accounting firm, though Form 4 succession following any such acquisition is available only if all of the Exhibit 99.4 criteria are satisfied.

The Exhibit 99.4 certification also includes a statement that the predecessor registered firm intended for the successor firm to succeed to its registration status. One commenter questioned the appropriateness of allowing a single individual to certify that the predecessor intended such succession, and expressed concern about the Board acting on such a certification by someone who may only have had a marginal role in the predecessor registered firm. As proposed and adopted, however, the required certification would be included in a filing that cannot be made except by the successor firm, which cannot make the filing unless a majority of the predecessor's owners are part of that successor firm. In those circumstances, it is not necessary to more specifically limit which of the predecessor's former owners or officers must execute the required certification.

In the context of a combination of firms, Form 4 succession is available only if the predecessor registered firm ceases to exist as a public accounting firm. One commenter questioned this requirement and suggested that a firm should be able to spin off its issuer audit business, including its registration status, to another firm and still remain a public accounting firm. The Board is not precluding the possibility that a firm can spin off its issuer audit business and still remain a public accounting firm; rather, the Board is identifying this criterion—whether the predecessor continues to exist as a public accounting firm—as relevant to whether registration status can move to the new firm through the Form 4 process or whether that firm can obtain registration status only through the Form 1 process.

If the predecessor registered firm continues to exist as the same legal entity that registered with the Board and continues to be engaged in the practice of public accounting, then the transaction suggested by the commenter would involve an existing public accounting firm—an entity which can legally be registered—conveying its registration to another public accounting firm, a transaction that the Board views as fundamentally inappropriate. Accordingly, in that circumstance, the firm to which the predecessor's issuer audit practice moved could not use the Form 4 process but would need to apply for registration on Form 1—which it could do even before the relevant transaction takes effect.

In contrast, if the legal entity that originally registered ceases to exist as a public accounting firm, then it cannot legally be a registered public accounting firm. For that entity's registration status to move with elements of that entity into another entity, through the Form 4 process, does not raise the same concerns about transferability of registration from one existing public accounting firm to another.

One commenter questioned the requirement to file a Form if a firm involved in the transaction would need to answer ''yes'' on the Form 1 disciplinary history question if filing a Form 1. The commenter suggested that this requirement could be punitive, especially for large registered firms that combine with smaller firms. Item 3.2.e. of Form 4, however, does not pose any significant risk of that sort. If a large registered firm acquires a smaller unregistered firm, the large registered firm would merely be required to report that in its annual report on Form 2, without resort to the Form 4 process. Alternatively, if a large registered firm were involved in a transaction that did lead to a Form 4 filing, the disciplinary histories of that firm and its associated persons would be irrelevant to Item 3.2.e. because the large firm was already registered at the time of the transaction. Item 3.2.e. relates only to disciplinary history information of entities (and their associated persons) that were not already registered at the time of the transaction.

Commenters suggested that the proposed 90-day limit on the temporary transition period (for firms that may not succeed permanently to the predecessor's registration) was too short and too inflexible. They noted that the Board has 45 days to act on an application, and also noted that the Board could ask for additional information, thereby restarting the 45-day clock and potentially pushing a registration decision out beyond the 90-day period. One commenter suggested revising the proposal so that the temporary registration status would continue until the Board makes a final decision on the Form 1. Another suggested revising the proposal to give the Board flexibility to extend the temporary registration status in situations where the Board does not take final action on the Form 1 within the 90 days.

The Board does not believe it would be appropriate to adopt a rule providing for a temporary registration period that continues until the Board acts on the Form 1, since firms could then keep the temporary registration status in place by not filing Form 1 or by delaying a response to a Board request for additional information on the application. The Board, however, sees the value in a measure of flexibility on this point. Accordingly, in Rule 2108(b)(2), the Board has retained the proposed 90 days as the initial transition period but has also added certain qualifications. If the Board formally requests additional information from the firm with less than 60 days remaining in the initial 90-day period, the temporary registration will continue to the date that is 60 days after the date of the Board's request. The effect will be that a firm has 15 days to respond to the Board's request if the firm wants to stay on track to keep its temporary registration until Board action on the Form 1. If the Board makes follow-up requests for information, the Board has the discretion to extend the temporary registration to a later date. Depending on the circumstances, however, the Board might, in making a follow-up request, conclude that further extension of the temporary registration is unwarranted, and could communicate that to the firm in the second request.

One commenter suggested that the Board should adopt procedures by which a firm that anticipates that a successor will need to file a new Form 1 could review the relevant facts with the Board's staff before the transaction to determine whether the staff sees significant obstacles to approving the successor's application. In the Board's view, however, to the extent it is appropriate for the staff to review information relevant to a prospective Form 1 filing, the staff may already do so without the need for special procedures.

One commenter addressed the requirement that, in the context of more than two firms combining, any registered firm other than the firm whose registration is intended to continue, must, before Form 4 is filed, file a request to withdraw from registration. The commenter expressed concern that there may be a registration gap for the predecessor firm that files the Form 1–WD prior to the transaction if the withdrawal is granted prior to the close of the transaction. The representation concerning the filing of a 1–WD, however, does not apply to the ''predecessor firm,'' but only to other registered firms, if any, that are merging into the filing entity as part of the transaction. In connection with any Form 4 filing, the firm designated as the ''predecessor firm'' should not seek leave to withdraw from registration. In addition, in transactions involving additional registered firms, the Form 1–WD filings need not occur far in advance of the Form 4 filing. The Form 4 requirements can be satisfied even if the relevant Form 1–WD filings occur immediately before the Form 4 filing.

One commenter noted that changes in licenses and certifications may occur after the filing of a Form 4 and suggested that the Board should expressly state that such changes may be described in an amendment to Form 4. Because a firm succeeds to registration automatically upon the Form 4 being filed, however, the firm immediately becomes subject to the same annual and special reporting requirements as any other registered firm. Accordingly, a license change that occurs after the filing of the Form 4 should be reported on Form 3 in accordance with Rule 2203.

For succession to registration to take effect automatically upon filing under the rules, Form 4 must be filed within 14 days after the effective date of the change in legal form or other event. Commenters expressed a view that 14 days is too short a period, and suggested

that it was insufficient time for non-U.S. firms to evaluate the impact of non-U.S. law in a particular case or to obtain consents, waivers, and legal opinions relating to potential legal conflicts. More generally, one commenter noted that 14 days does not allow sufficient time after the event for a firm to assess its reporting obligations and complete the form. Two commenters suggested expanding the 14-day period to a 45-day period.

The Board has considered these comments but has decided to adopt the 14-day deadline. Given the purpose of the filing—avoiding breaks in registration status—the Board believes that the rule should require filing of the form in as short a period as reasonably possible, so that any questions about the entity's registration status are kept to as narrow a period as possible. In addition, the events giving rise to a Form 4 are events for which firms plan, and such planning can encompass prompt filing of the relatively short and simple Form 4.

Even so, the rules make some allowance for late filing. A firm that fails to file Form 4 within the 14-day period may submit a late Form 4 and request that the Board grant leave to file the form out of time. In a late submission, the firm should include as an exhibit to the form a statement in support of its request for leave to file out of time. If the Board grants the request and allows the form to be filed, the firm will succeed to the predecessor's registration (either outright or for the transitional period described above).

One commenter sought clarification of a firm's registration status during a period in which a Form 4 is pending with a request for leave to file out of time, suggesting that it is unclear whether the firm can issue audit reports while the request is pending. As discussed in the proposing release, a firm submitting a late Form 4 should make no assumption about whether the Board will allow it to be filed. Accordingly, during the period that the request is pending with the Board, a firm should not assume that it is a registered public accounting firm and, therefore, should not assume that it may issue audit reports. The rule's provision for late submissions is not principally intended as an accommodation to firms, but is intended to afford the Board the opportunity to allow Form 4 succession, despite a late filing, when doing so would be consistent with the public interest. Eventual favorable Board action on the request would effectively confer registered status on the firm back to the date of the transaction that is the subject of the Form 4 filing (just as with a timely filed Form 4), but unfavorable Board action would mean that the entity filing the Form 4 was never registered.

One commenter suggested that non-U.S. firms might also sometimes face legal obstacles to answering the Item 3.2.e. yes-no questions that determine whether succession is permanent or temporary. The Board has determined to allow non-U.S. firms to withhold those answers on legal conflict grounds. The consequence of doing so, however, will be the same as if the firm had supplied a ''no'' answer: the succession afforded by the Form 4 process will only be for a transitional period to allow the firm an opportunity to seek registration through the Form 1 process.

Form 4 limits the categories of information for which a firm can request confidential treatment. Confidential treatment requests that have no genuine basis in law needlessly distract Board resources and delay the availability of information to the public. In the case of Form 4, the basic, nonpersonal, and nonproprietary nature of the required information leads the Board to foreclose confidential treatment requests for almost all of the items in the form.

The Board encouraged commenters to comment on whether the proposal overlooked actual or realistically foreseeable legal requirements to maintain the confidentiality of information. Commenters who addressed the point did so only in vague terms without providing any specific basis for concluding that the proposal overlooked any potentially applicable protection. One commenter stated generally that certain information required by Form 4 may need to be kept confidential under non-U.S. law or by the terms of an agreement between predecessor and successor entities. The commenter did not identify what information in Form 4 might fall into that category and did not provide an example of the type of non-U.S. law that might protect its confidentiality. Moreover, in the absence of relevant law, an agreement between private parties to keep information confidential does not in itself satisfy the confidential treatment criteria described in Rule 2300(b)(1). The commenter also expressed slightly more focused concern about the protection of ''information regarding the acquisition,'' but did not specify what information, among the very basic acquisition-related information required by Form 4, could be considered confidential or proprietary.

Another commenter raised potential confidentiality concerns about Item 3.2.e.1. As adopted, that Item asks whether the acquisition or combination involves any previously unregistered entity that, if it were filing an application for registration on Form 1, would have to provide an affirmative response to Item 5.1.a, which asks about the existence of certain specified disciplinary histories. The commenter suggested that indicating whether a firm would have to answer ''yes'' to that question might lead others to draw unfavorable conclusions that could expose the firm to an increased risk of liability claims. Whether that is true, though, is a separate question from whether that ''yes'' answer is information that is protected from disclosure by applicable law. The commenter did not suggest how that would be the case. Moreover, as a practical matter, any reader of the Form 4 would recognize that a firm's request for confidential treatment of its answer to Item 3.2.e.1. would mean that its answer was ''yes.''

In weighing these comments, the Board views as relevant the fact that Form 4 is not a required filing. While the Board does not view its optional nature as justification for dispensing with the possibility of confidential treatment, the Board does not believe that the comments on this point warrant any change from what was proposed.

III. Date of Effectiveness of the Proposed Rules and Timing for Commission Action

Within 60 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Board consents, the Commission will:

(a) By order approve such proposed rules; or

(b) Institute proceedings to determine whether the proposed rules should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rules are consistent with the requirements of Title I of the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/pcaob.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File

Number PCAOB 2008–05 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number PCAOB 2008–05. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/pcaob/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule that are filed with the Commission, and all written communications relating to the proposed rule between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the PCAOB. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. PCAOB–2008–05 and should be submitted on or before July 20, 2009.

By the Commission.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–14293 Filed 6–17–09; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF STATE

[Public Notice 6773]

Bureau of Educational and Cultural Affairs

Notice: Amendment to original Request for Grant Proposals (RFGP) (Critical Language Scholarships for Intensive Summer Institutes—Reference Number ECA/A/E–10–01).

Summary: The United States Department of State, Bureau of Educational and Cultural Affairs, announces revisions to the original RFGP (Public Notice 6640) announced in the **Federal Register** on Thursday, May 28, 2009 (**Federal Register** Volume 74, Number 101):

(1) Due to a typographic error on page 25600, Section II. Award Information, it should be noted that the anticipated award date is October 1, 2009 and not October 1, 2010. This section should read: ''Anticipated Award Date: Pending availability of funds, the proposed start date is October 1, 2009.''

(2) The deadline for proposals for Critical Language Scholarships for Intensive Summer Institutes has been extended to July 17, 2009.

(3) All other terms and conditions of the original RFGP remain the same.

Additional Information: As stated in the original RFGP, interested organizations should contact Heidi Manley, Program Officer at 202–453–8534 or by e-mail at *ManleyHL@state.gov* for additional information regarding the Critical Language Scholarships for Intensive Summer Institutes prior to the application deadline.

Dated: June 12, 2009.

C. Miller Crouch,

Acting Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E9–14339 Filed 6–17–09; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6551]

Advisory Committee to the U.S. Section of the Inter-American Tropical Tuna Commission (Committee Renewal)

SUMMARY: The Department of State announces the renewal of the Charter for the Advisory Committee to the U.S. Section of the Inter-American Tropical Tuna Commission (IATTC) for an additional two years. The Advisory Committee to the U.S. Section of the IATTC may be terminated only by law. In accordance with the provisions of the Federal Advisory Committee Act (Pub. L. 92–463), a new Charter must be issued on a biennial basis from the date the current Charter was approved and filed with Congress and the Library of Congress.

The IATTC was established pursuant to the Convention for the Establishment of an Inter-American Tropical Tuna Commission, signed in 1949. The purpose of the IATTC is to conserve and manage the fisheries and associated resources of the eastern tropical Pacific Ocean. The United States is represented to the IATTC by the U.S. Section, which includes four Presidentially-appointed Commissioners and a Department of State representative.

The General Advisory Committee to the United States Section of the IATTC was established pursuant to Section 4 of the Tuna Conventions Act of 1950 (16 U.S.C. 953, as amended), the implementing statute for the IATTC Convention. The goal of the Advisory Committee is to serve the U.S. Section to the IATTC, including the Department of State, as advisors on matters relating to international conservation and management of stocks of tuna and dolphins in the eastern tropical Pacific Ocean, and in particular to provide recommendations on the development of U.S. policy associated with such matters.

The Committee is composed of representatives of the major U.S. tuna harvesting, processing, and marketing sectors, as well as recreational fishing and environmental interests, formulating specific policy recommendations for the U.S. Section to the IATTC.

The Advisory Committee will continue to follow the procedure prescribed by the Federal Advisory Committee Act (FACA). Notice of meetings is published in the Federal Register in advance as required by FACA and meetings are open to the public unless a determination is made in accordance with Section 10 of the FACA that a meeting or a portion of the meeting should be closed to the public.

FOR FURTHER INFORMATION CONTACT: David F. Hogan, IATTC GAC Designated Federal Official, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, Washington, DC 20520, Phone: 202–647–2335.

Dated: April 16, 2009.

David F. Hogan,

Acting Deputy Assistant Secretary for Oceans and Fisheries, Department of State.

[FR Doc. E9–14345 Filed 6–17–09; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice 6675]

Culturally Significant Objects Imported for Exhibition Determinations: ''Degas and Music''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of

October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects in the exhibition: ''Degas and Music,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Hyde Collection, Glens Falls, NY, from on or about July 12, 2009, until on or about October 18, 2009 and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: (202–453–8050). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: June 12, 2009.

C. Miller Crouch,

Acting Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E9–14344 Filed 6–17–09; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice Number 6629]

Request for New Member Applications for the Advisory Committee on Persons With Disabilities

SUMMARY: Applications are being solicited to fill two (possibly 3) vacant positions on the Advisory Committee on Persons with Disabilities of the U.S. Department of State and the U.S. Agency for International Development.

Established on June 23, 2004, and re-chartered on July 3, 2008, the Advisory Committee on Persons with Disabilities serves the Secretary of State and the Administrator of the Agency for International Development in an advisory capacity with respect to the consideration of the interests of persons with disabilities in formulation and implementation of U.S. foreign policy and foreign assistance. The Committee is established under the general authority of the Secretary and the Department of State as set forth in Title 22 of the United States Code, in particular Sections 2656 and 2651a, and in accordance with the Federal Advisory Committee Act, as amended.

The Committee is made up of the Secretary of State, the Administrator of the Agency for International Development and an Executive Director (all ex-officio members); and eight members from outside the United States government. The non-government members of the Committee represent a cross section from not-for-profit organizations, public policy organizations, academic institutions, corporations and other experts on foreign policy or development issues related to persons with disabilities.

Two, possibly three non-government positions on the Committee are currently vacant, and applications are now being accepted for those positions. Individuals who wish to be considered for appointment to the Committee should forward their resumes to Stephanie Ortoleva, Bureau of Democracy, Human Rights and Labor, U.S. Department of State, 2201 ''C'' St., NW., Room 7822, Washington, DC 20520 by overnight or express mail (not regular postal mail), or by fax to: 202–647–4434 or, in electronic form, to: *ortolevas@state.gov.* All letters of interest and resumes must be received by July 7, 2009.

The Secretary will appoint the new members of this advisory committee, after consultation with the Administrator of the Agency for International Development, from the list of candidates. The term of membership will be 2 years.

Dated: June 9, 2009.

Stephanie Ortoleva,

Foreign Affairs Officer and Advisory Committee Executive Director, Bureau of Democracy, Human Rights and Labor, Department of State.

[FR Doc. E9–14342 Filed 6–17–09; 8:45 am]

BILLING CODE 4710–18–P

SUSQUEHANNA RIVER BASIN COMMISSION

Notice of Projects Approved for Consumptive Uses of Water

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice of approved projects.

SUMMARY: This notice lists the projects approved by rule by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: May 1, 2009, through May 31, 2009.

ADDRESSES: Susquehanna River Basin Commission, 1721 North Front Street, Harrisburg, PA 17102–2391.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel, telephone: (717) 238–0423, ext. 306; fax: (717) 238–2436; e-mail: *rcairo@srbc.net* or Stephanie L. Richardson, Secretary to the Commission, telephone: (717) 238–0423, ext. 304; fax: (717) 238–2436; e-mail: *srichardson@srbc.net.* Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists the projects, described below, receiving approval for the consumptive use of water pursuant to the Commission's approval by rule process set forth in 18 CFR 806.22(f) for the time period specified above:

Approvals by Rule Issued

1. EOG Resources, Inc., Pad ID: PHC 4H, ABR–20090501, Lawrence Township, Clearfield County, Pa., Consumptive Use of Up to 0.999 mgd, Approval Date: May 7, 2009.
2. EOG Resources, Inc., Pad ID: PHC 5H, ABR–20090502, Lawrence Township, Clearfield County, Pa., Consumptive Use of Up to 0.999 mgd, Approval Date: May 7, 2009.
3. EOG Resources, Inc., Pad ID: PHC 9H, ABR–20090503, Lawrence Township, Clearfield County, Pa., Consumptive Use of Up to 0.999 mgd, Approval Date: May 7, 2009.
4. Seneca Resources Corporation, Pad ID: Signor Pad A, ABR–20090504, Charleston Township, Tioga County, Pa., Consumptive Use of Up to 2.000 mgd, Approval Date: May 11, 2009.
5. Seneca Resources Corporation, Pad ID: Wilcox Pad F, ABR–20090505, Covington Township, Tioga County, Pa., Consumptive Use of Up to 2.000 mgd, Approval Date: May 11, 2009.
6. Fortuna Energy, Inc., Cease, Pad ID: ABR–20090506, Troy Township, Bradford County, Pa., Consumptive Use of Up to 3.000 mgd, Approval Date: May 13, 2009.
7. Fortuna Energy, Inc., Pad ID: Shedden D 26/27, ABR–20090507, Troy Township, Bradford County, Pa., Consumptive Use of 3.000 mgd, Approval Date: May 13, 2009.
8. Fortuna Energy, Inc., Pad ID: Harris M, ABR–20090508, Armenia Township, Bradford County, Pa., Consumptive Use of Up to 3.000 mgd, Approval Date: May 13, 2009.
9. Fortuna Energy, Inc., Pad ID: Bense, ABR–20090509, Troy Township, Bradford County, Pa., Consumptive Use of Up to 3.000 mgd, Approval Date: May 13, 2009.
10. Fortuna Energy, Inc., Pad ID: Phinney, ABR–20090510, Troy Township, Bradford County, Pa., Consumptive Use of Up to 3.000 mgd, Approval Date: May 13, 2009.

11. Alta Operating Company, LLC, Pad ID: Powers Pad Site, ABR–20090511, Forest Lake Township, Susquehanna River, Pa., Consumptive Use of Up to 3.000 mgd, Approval Date: May 14, 2009.

12. Anadarko E&P Company, LP, Pad ID: COP Tract 259 #1000H, ABR–20090513, Burnside Township, Centre County, Pa., Consumptive Use of Up to 5.000 mgd, Approval Date: Mar 14, 2009.

13. Chief Oil & Gas, LLC, Pad ID: Barto Unit #1H, ABR–20090514, Penn Township, Lycoming County, Pa., Consumptive Use of Up to 5.000 mgd, Approval Date: May 14, 2009.

14. Chief Oil & Gas, LLC, Pad ID: Harper Unit #1H, ABR–20090515, West Burlington Township, Bradford County, Pa., Consumptive Use of Up to 5.000 mgd, Approval Date: May 14, 2009.

15. Chief Oil & Gas, LLC, Pad ID: Jennings Unit #1H, ABR–20090516, West Burlington Township, Bradford County, Pa., Consumptive Use of Up to 5.000 mgd, Approval Date: May 14, 2009.

16. Chief Oil & Gas, LLC, Pad ID: Black Unit #1, ABR–20090517, Burlington Township, Bradford County, Pa., Consumptive Use of Up to 5.000 mgd, Approval Date: May 14, 2009.

17. EXCO–North Coast Energy, Inc., Pad ID: Lopatofsky, ABR–20090512, Clifford Township, Susquehanna County, Pa., Consumptive Use of Up to 1.000 mgd, Approval Date: May 14, 2009.

18. Chief Oil & Gas, LLC, Pad ID: Hutton Unit #1H, ABR–20090518, Chest Township, Clearfield County, Pa., Consumptive Use of Up to 5.000 mgd, Approval Date: May 18, 2009.

19. Chesapeake Appalachia, LLC, Pad ID: Ward, ABR–20090519, Burlington Township, Bradford County, Pa., Consumptive Use of Up to 7.500 mgd, Approval Date: May 19, 2009.

20. Chesapeake Appalachia, LLC, Pad ID: Hannan, ABR–20090520, Troy Township, Bradford County, Pa., Consumptive Use of Up to 7.500 mgd, Approval Date: May 19, 2009.

21. Chesapeake Appalachia, LLC, Pad ID: Isbell, ABR–20090521, Burlington Township, Bradford County, Pa., Consumptive Use of Up to 7.500 mgd, Approval Date: May 19, 2009.

22. Fortuna Energy, Inc., Pad ID: Knights, ABR–20090522, Troy Township, Bradford County, Pa., Consumptive Use of Up to 3.000 mgd, Approval Date: May 19, 2009.

23. Fortuna Energy, Inc., Pad ID: Harris A, ABR–20090523, Troy Township, Bradford County, Pa., Consumptive Use of Up to 3.000 mgd, Approval Date: May 19, 2009.

24. Chesapeake Appalachia, LLC, Pad ID: White, ABR–20090525, Auburn Township, Susquehanna County, Pa., Consumptive Use of Up to 7.500 mgd, Approval Date: May 21, 2009.

25. Fortuna Energy, Inc., Pad ID: Thomas F 38, ABR–20090524, Troy Borough, Bradford County, Pa., Consumptive Use of Up to 3.000 mgd, Approval Date: May 21, 2009.

26. Chesapeake Appalachia, LLC, Pad ID: Otten, ABR–20090526, Asylum Township, Bradford County, Pa., Consumptive Use of Up to 7.500 mgd, Approval Date: May 22, 2009.

27. Chesapeake Appalachia, LLC, Pad ID: Mowry, ABR–20090527, Tuscarora Township, Bradford County, Pa., Consumptive Use of Up to 7.500 mgd, Approval Date: May 22, 2009.

28. Chesapeake Appalachia, LLC, Pad ID: May, ABR–20090528, Granville Township, Bradford County, Pa., Consumptive Use of Up to 7.500 mgd, Approval Date: May 22, 2009.

29. Chesapeake Appalachia, LLC, Pad ID: John Barrett, ABR–20090529, Asylum Township, Bradford County, Pa., Consumptive Use of Up to 7.500 mgd, Approval Date: May 22, 2009.

30. Chesapeake Appalachia, LLC, Pad ID: James Barrett, ABR–20090530, Asylum Township, Bradford County, Pa., Consumptive Use of Up to 7.500 mgd, Approval Date: May 22, 2009.

31. Chesapeake Appalachia, LLC, Pad ID: Redling, ABR–20090531, Thompson Township, Susquehanna County, Pa., Consumptive Use of Up to 7.500 mgd, Approval Date: May 22, 2009.

32. Chesapeake Appalachia, LLC, Pad ID: Chancellor, ABR–20090532, Asylum Township, Bradford Count, Pa., Consumptive Use of Up to 7.500 mgd, Approval Date: May 22, 2009.

33. Chesapeake Appalachia, LLC, Pad ID: Clapper, ABR–20090533, Auburn Township, Susquehanna County, Pa., Consumptive Use of Up to 7.500 mgd, Approval Date: May 22, 2009.

34. Chesapeake Appalachia, LLC, Pad ID: Judd, ABR–20090534, Monroe Township, Bradford County, Pa., Consumptive Use of Up to 7.500 mgd, Approval Date: May 22, 2009.

35. Chesapeake Appalachia, LLC, Pad ID: VanNoy, ABR–20090535, Granville Township, Bradford County, Pa., Consumptive Use of Up to 7.500 mgd, Approval Date: May 22, 2009.

36. Cabot Oil and Gas Corporation, Pad ID: SevercoolB P1, ABR–20090536, Dimock Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

37. Cabot Oil and Gas Corporation, Pad ID: Heitsman P1, ABR–20090537, Dimock Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

38. Cabot Oil and Gas Corporation, Pad ID: Lathrop P1, ABR–20090538, Springville Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

39. Cabot Oil and Gas Corporation, Pad ID: Ratzel P1, ABR–20090539, Dimock Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

40. Cabot Oil and Gas Corporation, Pad ID: Smith P1, ABR–20090540, Springville Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

41. Cabot Oil and Gas Corporation, Pad ID: Teel P1, ABR–20090541, Springville Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

42. Cabot Oil and Gas Corporation, Pad ID: Teel P5, ABR–20090542, Springville Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

43. Cabot Oil and Gas Corporation, Pad ID: Teel P6, ABR–20090543, Springville Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

44. Cabot Oil and Gas Corporation, Pad ID: Hubbard P2, ABR–20090544, Dimock Township, Susquehanna County, Pa., Consumptive Use of Up to 3.5750 mgd, Approval Date: May 27, 2009.

45. Cabot Oil and Gas Corporation, Pad ID: Hubbard P1, ABR–20090545, Dimock Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

46. Cabot Oil and Gas Corporation, Pad ID: Ely P1, ABR–20090546, Dimock Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

47. Cabot Oil and Gas Corporation, Pad ID: Gesford P1, ABR–20090547, Dimock Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

48. Cabot Oil and Gas Corporation, Pad ID: Greenwood P1, ABR–20090548, Dimock Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

49. Cabot Oil and Gas Corporation, Pad ID: Gesford P3, ABR–20090549, Dimock Township, Susquehanna County, PA, Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

50. Cabot Oil and Gas Corporation, Pad ID: Gesford P4, ABR–20090550, Dimock Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

51. Cabot Oil and Gas Corporation, Pad ID: LaRue P2, ABR–20090551, Dimock Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

52. Cabot Oil and Gas Corporation, Pad ID: HeitsmanA P2, ABR–20090552, Dimock Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

53. Cabot Oil and Gas Corporation, Pad ID: Rozanski P1, ABR–20090553, Dimock Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

54. Cabot Oil and Gas Corporation, Pad ID: Smith P3, ABR–20090554, Dimock Township, Susquehanna County, Pa., Consumptive Use of Up to 3.575 mgd, Approval Date: May 27, 2009.

55. Chesapeake Appalachia, LLC, Pad ID: Przybyszewski, ABR–20090555, Auburn Township, Susquehanna County, Pa., Consumptive Use of Up to 7.500 mgd, Approval Date: May 29, 2009.

56. Chief Oil & Gas, LLC, Pad ID: Harris #1H, ABR–20090556, Burlington Township, Bradford County, Pa., Consumptive Use of Up to 5.000 mgd, Approval Date: May 29, 2009.

Authority: Public Law 91–575, 84 Stat. 1509 *et seq.,* 18 CFR Parts 806, 807, and 808.

Dated: June 9, 2009.

Thomas W. Beauduy,

Deputy Director.

[FR Doc. E9–14295 Filed 6–17–09; 8:45 am]

BILLING CODE 7040–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34836]

Arizona Eastern Railway, Inc.—Construction Exemption—in Graham County, AZ

AGENCY: Surface Transportation Board.

ACTION: Notice of exemption.

SUMMARY: The Board grants an exemption, under 49 U.S.C. 10502, from the prior approval requirements of 49 U.S.C. 10901 for Arizona Eastern Railway, Inc. (AZER) to construct a 12.1-mile rail line in Graham County, AZ, beginning at milepost 1133.5 at Safford, AZ, where it would connect with AZER's existing line and proceed 12.1 miles across the Gila River to the Safford Regional Airport and the Freeport-McMoRan, Inc. Dos Pobres Mine in Safford.

DATES: The exemption will be effective on July 15, 2009. Petitions to reopen must be filed by July 6, 2009.

ADDRESSES: An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34836, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, one copy of all pleadings must be served on petitioner's representative: John D. Heffner, John D. Heffner, PLLC, 1920 N Street, NW., Suite 800, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Melissa Ziembicki, (202) 245–0386. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Additional information is contained in the Board's decision. Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: June 12, 2009.

By the Board, Acting Chairman Mulvey and Vice Chairman Nottingham.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. E9–14317 Filed 6–17–09; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Saint Lawrence Seaway Development Corporation Advisory Board; Notice of Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App. I), notice is hereby given of a meeting of the Advisory Board of the Saint Lawrence Seaway Development Corporation (SLSDC), to be held from 9 a.m. to 10 a.m. (EDT) on Saturday, July 11, 2009, at the Corporation's Administration Building, 180 Andrews Street, Massena, New York 13662. The agenda for this meeting will be as follows: Opening Remarks; Consideration of Minutes of Past Meeting; Quarterly Report; Old and New Business; Closing Discussion; Adjournment.

Attendance at the meeting is open to the interested public but limited to the space available. With the approval of the Administrator, members of the public may present oral statements at the meeting. Persons wishing further information should contact, not later than Monday, July 6, 2009, Anita K. Blackman, Chief of Staff, Saint Lawrence Seaway Development Corporation, 1200 New Jersey Avenue, SE., Washington, DC 20590; 202–366–0091.

Any member of the public may present a written statement to the Advisory Board at any time.

Issued at Washington, DC, on June 12, 2009.

Collister Johnson, Jr.,

Administrator.

[FR Doc. E9–14283 Filed 6–17–09; 8:45 am]

BILLING CODE 4910–61–P

DEPARTMENT OF THE TREASURY

Departmental Offices; Renewal of the Treasury Borrowing Advisory Committee of the Securities Industry and Financial Markets Association

ACTION: Notice of renewal.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended (Pub. L. 92–463; 5 U.S.C. App. 2), with the concurrence of the General Services Administration, the Secretary of the Treasury has determined that renewal of the Treasury Borrowing Advisory Committee of the Securities Industry and Financial Markets Association (the ''Committee'') is necessary and in the public interest in connection with the performance of duties imposed on the Department of the Treasury by law.

FOR FURTHER INFORMATION CONTACT: Karthik Ramanathan, Acting Assistant Secretary for Financial Markets and Director, Office of Debt Management (202) 622–2042.

SUPPLEMENTARY INFORMATION: The purpose of the Committee is to provide informed advice as representatives of the financial community to the Secretary of the Treasury and Treasury staff, upon the Secretary of the Treasury's request, in carrying out Treasury responsibilities for Federal financing and public debt management.

The Committee meets to consider special items on which its advice is sought pertaining to immediate Treasury funding requirements and pertaining to longer term approaches to manage the national debt in a cost-effective manner. The Committee

usually meets immediately before the Treasury announces each mid-calendar quarter funding operation, although special meetings also may be held.

Membership consists of up to 20 representative members, appointed by Treasury. The members are senior level officials who are employed by primary dealers, institutional investors, and other major participants in the government securities and financial markets.

The Designated Federal Official for the Advisory Committee is the Director of the Office of Debt Management. The Treasury Department is filing copies of the Committee's renewal charter with appropriate committees in Congress.

Dated: June 1, 2009.

Karthik Ramanathan,

Acting Assistant Secretary, Financial Markets.

[FR Doc. E9–14282 Filed 6–17–09; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 5735 and Schedule P (Form 5735)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 5735, Possessions Corporation Tax Credit (Under Sections 936 and 30A), and Schedule P (Form 5735), Allocation of Income and Expenses Under Section 936(h)(5).

DATES: Written comments should be received on or before August 17, 2009 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Dawn Bidne, at (202) 622–3933, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *Dawn.E.Bidne@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Possessions Corporation Tax Credit (Under sections 936 and 30A), and Allocation of Income and Expenses Under Section 936(h)(5).

OMB Number: 1545–0217.

Form Number: Form 5735 and Schedule P (Form 5735).

Abstract: Form 5735 is used to compute the possessions corporation tax credit under sections 936 and 30A. Schedule P (Form 5735) is used by corporations that elect to share their income or expenses with their affiliates. The forms provide the IRS with information to determine if the corporations have computed the tax credit and the cost-sharing or profit-split method of allocating income and expenses.

Current Actions: There are no changes being made to the forms at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 10.

Estimated Time per Respondent: 12 hours, 42 minutes.

Estimated Total Annual Burden Hours: 127.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: June 5, 2009.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E9–14272 Filed 6–17–09; 8:45 am]

BILLING CODE 4830–01–P

TENNESSEE VALLEY AUTHORITY

Environmental Impact Statement for Muscle Shoals Reservation Redevelopment

AGENCY: Tennessee Valley Authority (TVA).

ACTION: Notice of intent.

SUMMARY: The Tennessee Valley Authority (TVA) will prepare an environmental impact statement (EIS) addressing the impacts of the disposal and alternative future uses of approximately 1,380 contiguous acres of land on its Muscle Shoals Reservation (MSR) in Colbert County, Alabama. Public comment is invited concerning both the scope of the EIS and environmental issues that should be addressed in the EIS.

DATES: Comments on the scope and environmental issues for the EIS should be received no later than Wednesday, August 5, 2009, to ensure consideration.

ADDRESSES: Written comments should be sent to Stanford E. Davis, Senior NEPA Specialist, NEPA Resources, Environmental Services and Programs, 400 West Summit Hill Drive, Knoxville, Tennessee 37902. Comments may also be submitted via TVA's Web site at *http://www.tva.gov/environment/reports/comments.htm* or submitted by fax at 865/632–3451.

SUPPLEMENTARY INFORMATION:

Background

This notice is provided in accordance with the Council on Environmental Quality's regulations (40 CFR parts 1500 to 1508), TVA's procedures implementing the National Environmental Policy Act (NEPA), and Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations (36 CFR part 800).

The MSR is geographically located in the center of the cities of Florence, Muscle Shoals, Sheffield, and Tuscumbia. The Federal property that is the subject of this EIS includes the area bounded by Reservation Road on the

north, Hatch Boulevard on the west, Second Street on the south, and Wilson Dam Road on the east. Also included is an access corridor to the Tennessee River in the vicinity of the slag area, the Western Area Radiological Laboratory (WARL) property, and the Multipurpose Building (MPB) Complex, which includes the Multipurpose Building, the Office Service Warehouse Annex, and the Office Service Warehouse, all on the north side of Reservation Road. A small amount of land surrounding the International Fertilizer Development Center and the site of the Muscle Shoals TVA Employees Credit Union would not likely be included in the proposal. Except for the slag area, WARL, and MPB Complex, the TVA-managed land north of Reservation Road is not part of this land disposal action. It will continue to be used for public access and conservation with the possibility of enhancements to recreation related activities that are presently open to the public.

The former United States Nitrate Plant No. 2 was built for the War Department during World War I on property that is now part of the MSR. Following the war, this plant was idle until the creation of TVA in 1933, when it became the nucleus of TVA's National Fertilizer Development Center (NFDC). At its peak around 1980, the NFDC occupied about 475 acres of MSR land. Roughly 2,800 TVA employees worked in Muscle Shoals at that time, while approximately 600 to 700 people work there today. Over the years, NFDC developed many of the fertilizers and fertilizer production processes used in the world today. Fertilizer development and production operations began scaling back around 1990 and by 1998 had largely ceased. TVA began demolishing some unused buildings and other structures in 1983, and since then, 34 structures (36 percent of the structures present in 1983) have been removed. The MSR presently provides office space, laboratories, and support facilities for staff primarily involved in environmental services, research and technology; central support and repair; environmental stewardship; and power system operations and maintenance.

The Muscle Shoals Historic District (MSHD) includes historic properties associated with five prehistoric and historic contexts, which include a prehistoric mortuary complex, the Civil War, the Wilson Dam, the New Deal, and TVA's development of Muscle Shoals after the New Deal. Because a large number of buildings and structures, as a whole, demonstrate significant prehistoric and historic events associated with the area, the MSHD was recognized as eligible for listing on the National Register of Historic Places (NRHP) by the Alabama Historical Commission in October 2007. The boundaries of the MSHD include the 1,380 acres of the MSR subject to this EIS.

Part of the MSR was contaminated by historic chemical production and disposal practices. This part of the MSR contains a number of solid waste management units (SWMUs), which have been cleaned, *i.e.,* remediated, to industrial standards. Most of these SWMUs are part of the 1,380 acres proposed for disposal and may require additional remediation to allow uses other than industrial. Five SWMUs on the MSR property are subject to continuing monitoring requirements and likely will be retained by TVA.

The redevelopment of unused parts of the MSR is consistent with TVA's economic development mission. Due to its central location, flat terrain, highway access, and availability of utilities, the surrounding cities and counties have expressed interest in the redevelopment of the MSR for many years. In response to these requests, TVA has previously made a few areas on the periphery of the MSR available for commercial use. The currently proposed actions would make a much larger area available for a variety of redevelopment activities.

Several surrounding cities and counties have been coordinating in the creation of a cooperative district under Alabama law. The district would then be eligible to be involved in the development of the MSR property proposed for disposal, perhaps through the creation of a comprehensive master development plan and/or the acquisition of the property.

Potential Alternatives

The EIS will analyze a range of alternatives for redeveloping the MSR site. Under Alternative A, No Action, TVA would continue to use the MSR for program purposes and regional economic development, as guided by the 1996 Muscle Shoals/Wilson Dam Reservation Land Use Plan. Under this plan, TVA identified MSR and Wilson Dam Reservation property for various potential governmental and nongovernmental uses including economic development opportunity. The remainder of MSR, largely north of Reservation Road, was allocated in the 1996 land plan for TVA program purposes, including public recreation and conservation.

Under the action alternatives, TVA proposes to dispose of this MSR land without restrictions on the future use of the property, except as described below. The EIS will evaluate four action alternatives associated with different potential future land uses. Some elements common to all action alternatives include:

1. Requirements to protect or mitigate impacts to historic properties and endangered and threatened species; mitigate other potential environmental impacts; protect TVA's statutory, programmatic, and other interests; and ensure continued ongoing operational requirements such as monitoring SWMUs.

2. The potential disposal of an access corridor to the Tennessee River, WARL, and MPB Complex north of Reservation Road; the corridor, in the vicinity of the slag pile, could be used for utilities or other supporting infrastructure development.

3. The encouragement of the adaptive reuse of existing buildings, including historic buildings.

4. The likely retention by TVA of five SWMUs that have long-term monitoring requirements and restrictions on use.

The action alternatives presently under consideration by TVA include the following: Alternative B—Industrial Use; Alternative C—Commercial/Retail Use; Alternative D—Residential Use; and Alternative E—Mixed Use, a combination of industrial, commercial/retail, and residential uses.

TVA will use the results of the public scoping process and additional technical scoping studies to refine the range of alternatives that will be evaluated in detail in the EIS.

Proposed Issues To Be Addressed

The EIS will contain descriptions of the existing environmental and socioeconomic resources within the area that would be affected by the range of proposed actions. TVA's evaluation of potential impacts to these resources will include, but not necessarily be limited to, historic and archaeological resources, socioeconomic resources, solid and hazardous wastes including existing SWMUs, floodplains management, land use, transportation, air quality, terrestrial and aquatic ecology including threatened and endangered species, wetlands, surface water and groundwater quality, and environmental justice.

Scoping Process

Scoping is an integral component of the NEPA process for soliciting public input to ensure that issues are identified early and properly studied. The range of alternatives and the issues to be addressed in the draft EIS will be determined, in part, from comments received during this scoping process.

The preliminary identification of a reasonable range of alternatives and environmental issues in this notice is not meant to be exhaustive or final.

The participation of affected Federal, State, and local agencies and Indian tribes, as well as other interested persons, is invited. Pursuant to the regulations of the Advisory Council on Historic Preservation implementing Section 106 of the NHPA, TVA also solicits comments on the potential of the proposed action to affect historic properties. As indicated above, TVA recognizes the presence of significant historic resources on the property and will consult with the Alabama Historical Commission regarding appropriate treatment in the event these resources are transferred to nonfederal ownership. This notice also provides an opportunity under Executive Orders 11990 and 11988 for early public review of the potential for TVA's action to affect wetlands and floodplains, respectively.

Comments on the scope of this EIS should be submitted no later than the date given under the **DATES** section of this notice. Any comments received, including names and addresses, will become part of the administrative record and will be available for public inspection.

TVA will hold a public scoping meeting on Tuesday, July 14, 2009. The open-house style meeting will be held from 4 p.m. to 7 p.m. Central Daylight Time at Muscle Shoals High School, 1900 Avalon Avenue, Muscle Shoals, Alabama 35661.

Upon consideration of the scoping comments, TVA will develop alternatives and identify environmental issues to be addressed in the EIS. These will be described in a report that will be available to the public. Following analysis of the environmental consequences of each alternative, TVA will prepare a draft EIS for public review and comment. Notice of availability of the draft EIS will be published by the Environmental Protection Agency in the **Federal Register**. TVA will solicit comments on the draft EIS in writing and at a public meeting to be held in the project area. TVA expects to release the draft EIS in the spring of 2010 and the final EIS in late summer of 2010.

Dated: June 11, 2009.

Anda A. Ray,

Senior Vice President and Environmental Executive, Office of Environment and Research.

[FR Doc. E9–14414 Filed 6–17–09; 8:45 am]

BILLING CODE 8120–08–P

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974; System of Records

AGENCY: Department of Veterans Affairs (VA).

ACTION: Notice of amendment to system of records.

SUMMARY: The Privacy Act of 1974 (5 U.S.C. 552(e)(4)) requires that all agencies publish in the **Federal Register** a notice of the existence and character of their systems of records. Notice is hereby given that the Department of Veterans Affairs (VA) is amending the system of records entitled ''Readjustment Counseling Service (RCS) Vet Center Program—VA'' (64VA15) as set forth in the **Federal Register** 46 FR 9844 and last amended May 31, 2001. VA is amending the system by revising Routine Uses of Records Maintained in the System, Including Categories of Users and the Purposes of Such Uses. VA is republishing the system notice in its entirety at this time.

DATES: Comments on the amendment of this system of records must be received no later than July 20, 2009. If no public comment is received, the amended system will become effective July 20, 2009.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov;* by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 (this is not a toll-free number) for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Veterans Health Administration (VHA) Privacy Officer, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (704) 245–2492.

SUPPLEMENTARY INFORMATION: The name and number of the system is changed from ''Vietnam Veterans Readjustment Counseling Program—VA'' (64VA116) to ''Readjustment Counseling Service (RCS) Vet Center Program—VA'' (64VA15). The change in name will more accurately reflect the broader group of veterans receiving services and the environment in which the services are delivered.

For purposes of this notice changes have been made to update the following sections: Addresses and Routine Uses of Records Maintained in the System, Including Categories of Users and the Purposes of Such Uses. According to VA leadership, routine uses one through seven are mandatory new routine uses that are added to comply with new Federal policy and guidelines. Listed below are the mandatory routine uses that must be included in every System of Records according to VA leadership in order to comply with Federal regulations.

A new Routine Use one (1) is added. The record of an individual who is covered by a system of records may be disclosed to a Member of Congress, or a staff person acting for the member, when the member or staff person requests the record on behalf of and at the written request of the individual.

VA must be able to provide information about individuals to adequately respond to inquiries from Members of Congress at the request of constituents who have sought their assistance.

A new Routine Use two (2) is added. Disclosure may be made to the National Archives and Records Administration (NARA) and the General Services Administration (GSA) in records management inspections conducted under authority of Title 44, Chapter 29, of the United States Code (U.S.C.).

NARA and GSA are responsible for management of old records no longer actively used, but which may be appropriate for preservation, and for the physical maintenance of the Federal government's records. VA must be able to provide the records to NARA and GSA in order to determine the proper disposition of such records.

A new Routine Use three (3) is added. Records from a system of records may be disclosed to the Department of Justice (DOJ) (including U.S. Attorneys) or in a proceeding before a court, adjudicative body, or other administrative body when litigation or the adjudicative or administrative process is likely to affect VA, its employees, or any of its components is a party to the litigation or process, or has an interest in the litigation or process, and the use of such records is deemed by VA to be relevant and necessary to the litigation or process, provided that the disclosure is

compatible with the purpose for which the records were collected.

VA must be able to provide information to DoJ in litigation where the United States or any of its components is involved or has an interest. A determination would be made in each instance that under the circumstances involved; the purpose is compatible with the purpose for which VA collected the information. This routine use is distinct from the authority to disclose records in response to a court order under subsection (b)(11) of the Privacy Act, 5 U.S.C. 552(b)(11), or any other provision of subsection (b), in accordance with the court's analysis in *Doe* v. *DiGenova,* 779 F.2d 74, 78–84 (DC Cir. 1985) and *Doe* v. *Stephens,* 851 F.2d 1457, 1465–67 (DC Cir. 1988).

A new Routine Use four (4) is added. Disclosure of relevant information may be made to individuals, organizations, private or public agencies, or other entities with whom VA has a contract or agreement or where there is a subcontract to perform such services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor or subcontractor to perform the services of the contract or agreement.

This routine use, which also applies to agreements that do not qualify as contracts defined by Federal procurement laws and regulations, is consistent with OMB guidance in OMB Circular A–130, App. I, paragraph 5a(1)(b) that agencies promulgate routine uses to address disclosure of Privacy Act-protected information to contractors in order to perform the services contracts for the agency.

A new Routine Use five (5) is added. VA may disclose on its own initiative any information that is relevant to a suspected or reasonably imminent violation of the law whether civil, criminal, or regulatory in nature and whether arising by general or program statute or by regulation, rule, or order issued pursuant thereto, to a Federal, State, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule, or order. VA may also disclose on its own initiative the names and addresses of veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, or order issued pursuant thereto.

VA must be able to provide on its own initiative information that pertains to a violation of laws to law enforcement authorities in order for them to investigate and enforce those laws. Under 38 U.S.C. 5701(a) and (f), VA may only disclose the names and addresses of veterans and their dependents to Federal entities with law enforcement responsibilities. This is distinct from the authority to disclose records in response to a qualifying request from a law enforcement entity, as authorized by Privacy Act subsection 5 U.S.C. 552a(b)(7).

A new Routine Use six (6) is added. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

This routine use permits disclosures by the Department to report a suspected incident of identity theft and provide information and/or documentation related to or in support of the reported incident.

A new Routine Use seven (7) is added. Disclosure of information may be made when (1) It is suspected or confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of embarrassment or harm to the reputations of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (3) the disclosure is to agencies, entities, and persons who are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by the Department to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

The notice of intent to publish and an advance copy of the system notice have been sent to the appropriate Congressional committees and to the Director of the Office of Management and Budget (OMB) as required by 5 U.S.C. 552a(r) (Privacy Act) and guidelines issued by OMB (65 FR 77677), December 12, 2000.

Approved: June 1, 2009.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

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SYSTEM NAME:

Readjustment Counseling Service (RCS) Vet Center Program—VA.

SYSTEM LOCATION:

(a) *Counseling Folder:* Maintained at each individual Vet Center providing readjustment counseling throughout the country. The locations of all Vet Centers providing readjustment counseling are listed in VA Appendix 2 of the Biennial Privacy Act Issuances publication.

(b) *Client Information File:* Certain information extracted from the counseling folder is stored on stand-alone personal computers at each Vet Center, each of the seven RCS regional managers' offices, and the RCS national data support center.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Eligible veterans who request and/or are provided readjustment counseling, including veterans' family members and/or other persons of significant relationship to the veteran who are eligible. Eligibility for readjustment counseling at Vet Centers includes any veteran who served in the military in a theater of combat operations during any period of war, or in any area during a period in which armed hostilities occurred. Family members are also eligible for readjustment counseling to the extent necessary to assist the veteran.

CATEGORIES OF RECORDS IN THE SYSTEM:

(a) *Counseling Folder:* All written intake forms, applications, progress notes and demographic and clinical documentation deemed necessary to provide quality counseling and continuity of care by the counselors and/or program officials. This would include all information collected for the computerized database. (b) *Client Information File:* Unique veteran identification number; social security number; Vet Center team number; marital status; gender; birth date; service dates; branch of service; veteran eligibility information; theater of operation; service-connection; discharge; referral source; visit information and treatment; and other statistical information about services provided to that veteran.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Title 38, United States Code, section 1712A.

PURPOSE(S):

The purpose of this system of records is to collect and maintain all demographic and clinical information required to conduct a psychological assessment, to include a military history, and provide quality readjustment counseling to assist veterans resolve war trauma and improve their level of post-war functioning.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

1. The record of an individual who is covered by a system of records may be disclosed to a Member of Congress, or a staff person acting for the member, when the member or staff person requests the record on behalf of and at the written request of the individual.

2. Disclosure may be made to the National Archives and Records Administration and the General Services Administration in records management inspections conducted under authority of Title 44, Chapter 29, of the United States Code (U.S.C.).

3. Records from a system of records may be disclosed to the Department of Justice (DOJ) (including U.S. Attorneys) or in a proceeding before a court, adjudicative body, or other administrative body when litigation or the adjudicative or administrative process is likely to affect VA, its employees, or any of its components is a party to the litigation or process, or has an interest in the litigation or process, and the use of such records is deemed by VA to be relevant and necessary to the litigation or process, provided that the disclosure is compatible with the purpose for which the records were collected.

4. Disclosure of relevant information may be made to individuals, organizations, private or public agencies, or other entities with whom VA has a contract or agreement or where there is a subcontract to perform such services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor or subcontractor to perform the services of the contract or agreement.

5. VA may disclose on its own initiative any information in the system, except the names and home addresses of veterans and their dependents, that is relevant to a suspected or reasonably imminent violation of the law whether civil, criminal, or regulatory in nature and whether arising by general or program statute or by regulation, rule, or order issued pursuant thereto, to a Federal, State, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule, or order. VA may also disclose on its own initiative the names and addresses of veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, or order issued pursuant thereto.

6. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

7. Disclosure of information may be made when (1) It is suspected or confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of embarrassment or harm to the reputations of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (3) the disclosure is to agencies, entities, and persons whom VA determines are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosure by the Department to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

(a) *Counseling Folder:* Paper documents stored in file folders.

(b) *Client Information File:* Stored on stand-alone personal computer hard drives and any backup media.

RETRIEVABILITY:

(a) *Counseling Folder:* Filed or indexed alphabetically by last name or unique Client Number.

(b) *Client Information File:* Indexed by Vet Center Number in conjunction with unique Client Number and social security number.

SAFEGUARDS:

(a) *Counseling Folder:* Access to records at Vet Centers will be controlled by Vet Center staff during working hours. During other hours, records will be maintained in locked file cabinets. In high crime areas, Vet Center offices are equipped with alarm systems. (b) *Client Information File:* The computerized file is in a stand-alone personal computer and access to records is for authorized Vet Center personnel. Access is achieved on a need-to-know basis with a password. Computer security is in compliance with RCS and VA computer security policy and protocol. All computers are password protected and stored inside the locked Vet Center.

RETENTION AND DISPOSAL:

(a) *Counseling Folder:* The records will be retained at the Vet Center for 50 years after the date of last activity. Destruction of counseling folders will be by shredding.

(b) *Client Information File:* Maintained for the duration of the program. Destruction will be by deleting all information on all Vet Center, RCS regional manager's office, and the RCS national data support center stand-alone personal computers containing the program database.

SYSTEM MANAGER(S) AND ADDRESS:

Chief Readjustment Counseling Officer (15), VA Central Office, 810 Vermont Ave, NW., Washington, DC 20420.

NOTIFICATION PROCEDURE:

A veteran who wishes to determine whether a record is being maintained by the Readjustment Counseling Service Vet Center Program under his or her name or other personal identifier or wishes to determine the contents of such records should submit a written request or apply in person to: (1) The Team Leader of the Vet Center, or the RCS Regional Manager having supervisory responsibility for the Vet Center, with whom he or she had contact, or (2) the Chief Readjustment Counseling Officer (15), VA Central Office, 810 Vermont Ave, NW., Washington, DC 20420. Inquiries should include the individual's full name and social security number.

RECORD ACCESS PROCEDURES:

An individual (or duly authorized representative of such individual) who seeks access to or wishes to contest records maintained under his or her name or other personal identifier may

write, call or visit the above named individuals.

CONTESTING RECORD PROCEDURES:

(See Record Access Procedures above.)

RECORD SOURCE CATEGORIES:

(1) Relevant forms to be filled out by Vet Center team members on first contact and each contact thereafter; counseling sessions with veterans and other eligible counselees. (2) Other VA and Federal agency systems.

[FR Doc. E9–14301 Filed 6–17–09; 8:45 am]

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Federal Register

Thursday,
June 18, 2009

Part II

Securities and Exchange Commission

17 CFR Parts 200, 232, 240 et al.
Facilitating Shareholder Director Nominations; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 232, 240, 249 and 274

[Release Nos. 33–9046; 34–60089; IC–28765; File No. S7–10–09]

RIN 3235–AK27

Facilitating Shareholder Director Nominations

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing changes to the federal proxy rules to remove impediments to the exercise of shareholders' rights to nominate and elect directors to company boards of directors. The new rules would require, under certain circumstances, a company to include in the company's proxy materials a shareholder's, or group of shareholders', nominees for director. The proposal includes certain requirements, key among which are a requirement that use of the new procedures be in accordance with state law, and provisions regarding the disclosures required to be made concerning nominating shareholders or groups and their nominees. In addition, the new rules would require companies to include in their proxy materials, under certain circumstances, shareholder proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with the Commission's disclosure rules—including the proposed new rules. We also are proposing changes to certain of our other rules and regulations—including the existing exemptions from our proxy rules and the beneficial ownership reporting requirements—that may be affected by the new proposed procedures.

DATES: Comments should be received on or before August 17, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–10–09 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–10–09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/final.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Lillian Brown, Tamara Brightwell, or Eduardo Aleman, Division of Corporation Finance, at (202) 551–3200, or, with regard to investment companies, Kieran G. Brown, Division of Investment Management, at (202) 551–6784, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing new Rule 82a of Part 200 Subpart D—Information and Requests,[1] and new Rules 14a–11,[2] 14a–18,[3] and 14a–19,[4] new Regulation 14N[5] and Schedule 14N,[6] and amendments to Rule 13[7] of Regulation S–T,[8] Rules 13a–11,[9] 13d–1,[10] 14a–2,[11] 14a–4,[12] 14a–6,[13] 14a–8,[14] 14a–9,[15] 14a–12,[16] and 15d–11,[17] Schedule 14A,[18] and Form 8–K,[19] under the Securities Exchange Act of 1934.[20] Although we are not proposing amendments to Schedule 14C[21] under the Exchange Act, the proposed amendments would affect the disclosure provided in Schedule 14C, as Schedule 14C requires disclosure of some items of Schedule 14A.

Table of Contents

[1] 17 CFR 200.82a.
[2] 17 CFR 240.14a–11.
[3] 17 CFR 240.14a–18.
[4] 17 CFR 240.14a–19.
[5] 17 CFR 240.14n *et seq.*
[6] 17 CFR 240.14n–101.
[7] 17 CFR 232.13.
[8] 17 CFR 232.10 *et seq.*
[9] 17 CFR 240.13a–11.
[10] 17 CFR 240.13d–1.
[11] 17 CFR 240.14a–2.
[12] 17 CFR 240.14a–4.
[13] 17 CFR 240.14a–6.
[14] 17 CFR 240.14a–8.
[15] 17 CFR 240.14a–9.
[16] 17 CFR 240.14a–12.
[17] 17 CFR 240.15d–11.
[18] 17 CFR 240.14a–101.
[19] 17 CFR 249.308.
[20] 15 U.S.C. 78a *et seq.*
[21] 17 CFR 240.14c–101.

I. The Need for Reforms to the Federal Proxy Rules

A. Overview

The nation and the markets have recently experienced, and remain in the midst of, one of the most serious economic crises of the past century. This crisis has led many to raise serious concerns about the accountability and responsiveness of some companies and boards of directors to the interests of shareholders, and has resulted in a loss of investor confidence. These concerns have included questions about whether boards are exercising appropriate oversight of management, whether boards are appropriately focused on shareholder interests, and whether boards need to be more accountable for their decisions regarding such issues as compensation structures and risk management. In light of the current economic crisis and these continuing concerns, the Commission has determined to revisit whether and how the federal proxy rules may be impeding the ability of shareholders to hold boards accountable through the exercise of their fundamental right to nominate and elect members to company boards of directors.

Regulation of the proxy process and disclosure is a core function of the Commission and is one of the original responsibilities that Congress assigned to the Commission in 1934. Section 14(a) of the Exchange Act [22] stemmed from a Congressional belief that ''[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.'' [23] The Congressional committees recommending passage of Section 14(a) proposed that ''the solicitation and issuance of proxies be left to regulation by the Commission'' [24] and explained that Section 14(a) would give the Commission the ''power to control the conditions under which proxies may be solicited.'' [25] Congress thus recognized a federal interest in the way public corporations handle the proxy process, and granted the Commission authority to prescribe rules to regulate the solicitation of proxies ''as necessary or appropriate in the public interest or for the protection of investors.'' [26]

Responding to the Commission's mandate from Congress, the Commission has actively overseen the development of the proxy process since 1934. The Commission has monitored the process and has considered changes when it appeared that the process was not functioning in a manner that adequately protected the interests of investors.[27] At the same time, the Commission has been mindful of the traditional role of the states in regulating corporate governance. For example, Exchange Act Rule 14a–8,[28] the shareholder proposal rule, explicitly provides that a company is permitted to exclude a shareholder proposal if it ''is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization'' [29] or ''[i]f the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject.'' [30]

In identifying the rights that the proxy process should protect, the Commission has sought to take as a touchstone the rights of shareholders under state corporate law. As Chairman Ganson Purcell explained to a committee of the House of Representatives in 1943:

> The rights that we are endeavoring to assure to the stockholders are those rights that he has traditionally had under State law, to appear at the meeting; to make a proposal; to speak on that proposal at appropriate length; and to have his proposal voted on.[31]

This principle has given rise to a shorthand that explains much of the Commission's activity in regulating the proxy process. The proxy rules seek to improve the corporate proxy process so that it functions, as nearly as possible, as a replacement for an actual in-person meeting of shareholders.

Refining the proxy process so that it replicates, as nearly as possible, the annual meeting is particularly important given that the proxy process has become the primary way for shareholders to learn about the matters to be decided by the shareholders and to make their views known to company management.[32] Our recent examinations

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[22] 15 U.S.C. 78n(a).

[23] H.R. Rep. No. 1383, 73d Cong., 2d Sess., 13. *See also Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 381 (1970); *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 431 (1964).

[24] S. Rep. No. 792, 73d Cong., 2d Sess., 12 (1934).

[25] H.R. Rep. No. 1383, 73d Cong., 2d Sess., 14 (1934). The same report demonstrated a congressional intent to prevent frustration of the ''free exercise of the voting rights of stockholders.'' *Id.* Courts have found that the relevant legislative history also demonstrates an ''intent to bolster the intelligent exercise of shareholder rights granted by state corporate law.'' *Roosevelt* v. *E.I. Du Pont de Nemours & Co.,* 958 F.2d 416, 421 (D.C. Cir. 1992); *see Borak,* 377 U.S. at 431.

[26] 15 U.S.C. 78n(a).

[27] For example, as discussed in further detail below, the Commission has considered changes to the proxy rules in recent years. *See Security Holder Director Nominations,* Release No. 34–48626 (October 14, 2003) [68 FR 60784] (''2003 Proposal''); *Shareholder Proposals,* Release No. 34–56160 (July 27, 2007) [72 FR 43466] (''Shareholder Proposals Proposing Release''); *Shareholder Proposals Relating to the Election of Directors,* Release No. 34–56161 (July 27, 2007) [72 FR 43488] (''Election of Directors Proposing Release''); and *Shareholder Proposals Relating to the Election of Directors,* Release No. 34–56914 (December 6, 2007) [72 FR 70450] (Election of Directors Adopting Release''). When we refer to the ''2007 Proposals'' and the comments received in 2007, we are referring to the Shareholder Proposals Proposing Release and the Election of Directors Proposing Release and the comments received on those proposals, unless otherwise specified.

[28] 17 CFR 240.14a–8.

[29] 17 CFR 240.14a–8(i)(1).

[30] 17 CFR 240.14a–8(i)(2).

[31] Securit[ies] and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 before the House Committee on Interstate and Foreign Commerce, 78th Cong., 1st Sess. 172 (1943) (statement of SEC Chairman Ganson Purcell).

[32] *See, e.g.,* Securit[ies] and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the House Comm. on Interstate and Foreign Commerce, 78th Cong.,

Continued

of the proxy process and the comments that we have received in the course of these examinations suggest that the director nomination and shareholder proposal processes are two areas in which our current proxy rules pose impediments to the exercise of shareholders' rights.[33] These proposed amendments are intended to remove impediments so shareholders may more effectively exercise their rights under state law to nominate and elect directors at meetings of shareholders.

There are many competing policy arguments about the effect that shareholder-nominated directors or shareholder-proposed nomination procedures might have on a company and its governance. Some commenters believe that the presence of shareholder-nominated directors would make boards more accountable to the shareholders who own the company and that this accountability would improve corporate governance and make companies more responsive to shareholder concerns.[34] Some commenters further express the belief that, absent an effective way for shareholders to exercise rights to nominate and elect directors that state corporate law presumes shareholders have, the election of directors is a self-sustaining process of the board determining its members, with little actual input from shareholders.[35] Commenters have noted that without competition for director elections, directors are effectively unaccountable to shareholders and may lose sight of their proper role as representatives of the company.[36]

Similarly, foreign investors have noted the lack of accountability of directors in the United States compared with other countries, stating among other things that ''[t]he harsh reality is that U.S. corporate governance practices are on a relative decline compared to other leading markets.'' [37] In that vein, the Committee on Capital Markets Regulation has observed that this ''difference creates an important potential competitiveness problem for U.S. companies.'' [38] Other commenters have expressed concern that the relative inability of shareholders of U.S. companies to participate in the selection of directors compared with shareholders of their foreign competitors creates a competitiveness problem for U.S. companies.[39]

Academic literature also has highlighted the roles of boards of directors at companies that have demonstrated corporate governance failings. Such literature points to a link between board accountability and company performance.[40] In recognition of this link, Congress passed the Sarbanes-Oxley Act of 2002 to help strengthen corporate governance at public companies.[41] Commenters additionally have argued that competition for board seats might lead companies to nominate directors who are better qualified and more independent.[42]

On the other side of the debate, some commenters have raised concerns that shareholder-nominated directors could impede the proper functioning of companies and cause inefficiencies. For example, some argue that a shareholder-nominated director may be beholden to and focused solely on the concerns of the nominating shareholder or group, with the potential result being that a small number of shareholders could impose their unique concerns on the company and the rest of shareholders.[43] Additionally, some commenters have suggested that the presence of a shareholder-nominated director could disrupt the functioning of the board and could even lead to the company moving in a direction that does not reflect the interests of its shareholders overall.[44] Others have raised concerns that the possibility of a contested election could deter qualified candidates from seeking to serve as members of a board.[45]

1st Sess., at 17–19 (1943) (Statement of the Honorable Ganson Purcell, Chairman, Securities and Exchange Commission) (Explaining the initial Commission rules requiring the inclusion of shareholder proposals in the company proxy materials: ''We give [a stockholder] the right in the rules to put his proposal before all of his fellow stockholders along with all other proposals * * * so that they can see then what they are and vote accordingly. * * * The rights that we are endeavoring to assure to the stockholders are those rights that he has traditionally had under State law, to appear at the meeting; to make a proposal; to speak on that proposal at appropriate length; and to have his proposal voted on. But those rights have been rendered largely meaningless through the process of dispersion of security ownership through[out] the country. * * * [T]he assurance of these fundamental rights under State laws which have been, as I say, completely ineffective * * * because of the very dispersion of the stockholders' interests throughout the country[;] whereas formerly * * * a stockholder might appear at the meeting and address his fellow stockholders[, t]oday he can only address the assembled proxies which are lying at the head of the table. The only opportunity that the stockholder has today of expressing his judgment comes at the time he considers the execution of his proxy form, and we believe * * * that this is the time when he should have the full information before him and ability to take action as he sees fit.''); *see also* S. Rep. 792. 73d Cong., 2d Sess., 12 (1934) (''[I]t is essential that [the stockholder] be enlightened not only as to the financial condition of the corporation, but also as to the major questions of policy, which are decided at stockholders' meetings.'').

[33] *See, e.g.,* Unofficial Transcript of the Roundtable Discussion on Proposals for Shareholders, May 25, 2007, comments of Leo E. Strine Jr., Vice Chancellor, Court of Chancery of the State of Delaware (Vice Chancellor Strine), at 112, *available at: http://www.sec.gov/news/openmeetings/2007/openmtg_trans052507.pdf* (observing that it is ''a little bit perverse'' that ''a bylaw dealing with the election process that might well have been viable under state law was kept off the ballot when you could have something that was precatory mandated to be on the ballot'').

[34] *See, e.g.,* comment letters on the 2007 Proposals (SEC File Nos. S7–16–07 and S7–17–07) from James McRitchie, Corporate Governance (October 1, 2007) (''McRitchie 2007''); and Stephen Abrecht, Executive Director, SEIU Master Trust (October 1, 2007) (''SEIU'').

[35] *See, e.g.,* 2004 Roundtable Submission of Lucian Bebchuk: Lucian Arye Bebchuk, *The Case for Shareholder Access to the Ballot,* 59 The Business Lawyer 43, 49 (2003) (''Bebchuk 2003 Article'') (''Suppose that there is a widespread concern among shareholders that a board with a majority of independent directors is failing to serve shareholder interests. It is precisely under such circumstances that the nominating committee cannot be relied on to make desirable replacements of members of the board or even of members of the committee itself—at least not unless shareholders have adequate means of applying pressure on the committee.'').

[36] *See, e.g.,* comment letter on 2007 Proposals (SEC File Nos. S7–16–07 and S7–17–07) from William Apfel, et al., Walden Asset Management (September 11, 2007).

[37] Comment letter on 2007 Proposals (SEC File Nos. S7–16–07 and S7–17–07) from Michael O'Sullivan, President, Australian Council of Super Investors, et al. (October 2, 2007). *See also* Michelle Edkins, Acting Chairman, International Corporate Governance Network Shareholder Rights Committee (October 2, 2007) and Knut Kjer, CEO, Norges Bank Investment Management, et al. (September 28, 2007).

[38] Committee on Capital Markets Regulation, *Interim Report* (November 30, 2006) at 109, *available at: http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf.*

[39] *See* comment letter on 2007 Proposals (SEC File Nos. S7–16–07 and S7–17–07) from Carl Levin, United States Senator, (September 27, 2007) at page 6.

[40] *See, e.g.,* Michael E. Murphy, *The Nominating Process for Corporate Boards of Directors—A Decision-Making Analysis,* 5 Berkeley Bus. L.J. 131 (2008).

[41] *See, e.g.,* Section 301 of the Sarbanes-Oxley Act of 2002, inserting Section 10A(m) to the Exchange Act, which directed the Commission to promulgate rules requiring the national securities exchanges to ''prohibit the listing of any security of an issuer that is not in compliance'' with the Act's audit committee provisions. As a consequence, listed companies are now required to have audit committees composed solely of independent directors.

[42] *See generally* Bebchuk 2003 Article. *See also In re Oracle Corp. Derivative Litigation,* 824 A.2d 917, 941 (Del. Ch. 2003) (''The recent reforms enacted by Congress and by the stock exchanges reflect a narrower conception of who they believe can be an independent director. These definitions, however, are blanket labels that do not take into account the decision at issue. Nonetheless, the definitions recognize that factors other than the ones explicitly identified in the new exchange rules might compromise a director's independence, depending on the circumstances.'').

[43] *See, e.g.,* comment letters on 2007 Proposals from Thomas Wilson, President, The Allstate Corporation (October 2, 2007) and David T. Hirschmann, Senior Vice President, U.S. Chamber of Commerce (October 2, 2007).

[44] *See, e.g.,* comment letter on 2007 Proposals from Anne M. Mulcahy, Chairman, Business Roundtable Corporate Governance Task Force, Business Roundtable (October 1, 2007) (''Mulcahy, BRT'').

[45] *Id.*

We recognize that there are long-held and deeply felt views on both sides of these issues. The action we take today is focused on removing burdens that the federal proxy process currently places on the ability of shareholders to exercise their basic rights to nominate and elect directors. If we adopted rules to remove those burdens, we believe that these rules would facilitate shareholders' ability to participate more fully in the debates surrounding these issues. To the extent shareholders have the right to nominate directors at meetings of shareholders, the federal proxy rules should not impose unnecessary barriers to the exercise of this right.[46] The SEC's mission is investor protection, and we believe that investors are best protected when they can exercise the rights they have as shareholders, without unnecessary obstacles imposed by the federal proxy rules.

Based on the staff's and Commission's review of the proxy solicitation process and the extensive public input that we have received over the past several years on the topic of shareholders' ability to meaningfully exercise their rights to vote for and nominate directors of the companies in which they invest, we have decided to propose changes to the current proxy rules relating to the nomination of directors. First, we believe that we can and should structure the proxy rules to better facilitate the exercise of shareholders' rights to nominate and elect directors. The right to nominate is inextricably linked to, and essential to the vitality of, a right to vote for a nominee.[47] The failure of the proxy process to adequately facilitate shareholder nomination rights has a direct and practical effect on the right to elect directors.[48] As noted, the proxy rules have been designed to improve the proxy process so that it functions, as nearly as possible, as a replacement for an in-person meeting of shareholders. This is important because the proxy process today represents shareholders' principal means of participating effectively at an annual or special meeting of shareholders.[49] Based on the feedback we have received over the last few years, it appears that the federal proxy process may not be adequately replicating the conditions of the shareholder meeting. Second, we believe that parts of the federal proxy process may unintentionally frustrate voting rights arising under state law, and thereby fail to provide fair corporate suffrage. These two potential shortcomings in our regulations provide compelling reasons for us to reform the proxy process and our disclosure requirements relating to director nominations.[50] The comments received on the Commission's recent proposals on this topic in 2003 and in 2007, as well as the Roundtables held by the Commission in 2004 and 2007, helped form the basis for our beliefs.[51]

B. Shareholder Participation in the Nomination and Election Process

1. Existing Shareholder Options

Many commenters have noted that current procedures available for director nominations afford little practical ability for shareholders to participate effectively in the nomination process and, through that process, exercise their rights and responsibilities as owners of their companies.[52] If shareholders are dissatisfied with their company's performance and believe that the problem lies with the ineffectiveness of the company's board of directors, the existing proxy process provides shareholders with three principal options to attempt to effect change.[53] First, shareholders can mount a proxy contest in accordance with our proxy rules. Second, shareholders can use the shareholder proposal procedure in Rule 14a–8 to submit proposals and have a vote on topics that are important to them. Third, shareholders can conduct a ''withhold vote'' or ''vote no'' campaign against one or more directors.[54]

Shareholders also can use options that exist outside of the proxy process. For example, shareholders can sell their shares (sometimes referred to as the ''Wall Street Walk''); they can engage in a dialogue with management (including recommending a candidate to the

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[46] *See, e.g.,* Unofficial Transcript of the Roundtable on the Federal Proxy Rules and State Corporation Law (May 7, 2007), comments of R. Franklin Balotti, Director, Richards, Layton & Finger, P.A., at 14–17, *available at: http://www.sec.gov/spotlight/proxyprocess/proxy-transcript050707.pdf;* Unofficial Transcript of the Roundtable on the Federal Proxy Rules and State Corporation Law (May 7, 2007), comments of Vice Chancellor Strine, at 18–23; and Unofficial Transcript of the Roundtable on the Federal Proxy Rules and State Corporation Law (May 7, 2007), comments of Stanley Keller, Edwards Angell Palmer & Dodge LLP, at 142–143.

[47] *See, e.g., Durkin* v. *Nat'l Bank of Olyphant,* 772 F.2d 55, 59 (3d Cir. 1985) (stating that ''the unadorned right to cast a ballot in a contest for office, a vehicle for participatory decisionmaking and the exercise of choice, is meaningless without the right to participate in selecting the contestants. As the nominating process circumscribes the range of the choice to be made, it is a fundamental and outcome-determinative step in the election of officeholders. To allow for voting while maintaining a closed candidate selection process thus renders the former an empty exercise. This is as true in the corporate suffrage context as it is in civic elections, where federal law recognizes that access to the candidate selection process is a component of constitutionally-mandated voting rights. *See United States* v. *Classic,* 313 U.S. 299, 316–317, 85 L.Ed. 1368, 61 S.Ct. 1031 (1941) (article I, section 2, right to choose congressional representatives includes the right to participate in primary elections); *Smith* v. *Allwright,* 321 U.S. 649, 661–662, 88 L.Ed. 987, 64 S.Ct. 757 (1944) (fifteenth amendment prohibition of race-based abridgement of voting rights applies to primary as well as general elections). Banks do not exist for the purpose of creating an aristocracy of directors and officers which can continue in office indefinitely, immune from the wishes of the shareholder-owners of the corporation. And there is no more justification for precluding shareholders from nominating candidates for their board of directors than there would be for public officials to deny citizens the right to vote because of their race, poverty or sex. *Cf.* U.S. Const. amends. XV, XXIV, and XIX.'' *id.* at 59 (emphasis added)); and *Hubbard* v. *Hollywood Park Realty Enterprises, Inc.,* 1991 Del. Ch. LEXIS 9 (Del. Ch. Jan. 14, 1991) (quoting *Durkin*).

[48] *Shoen* v. *Amerco,* 885 F.Supp. 1332, 1342 (D. Nev. 1994) (''unadorned right to cast a ballot in a contest for office, after all, is meaningless without the right to participate in selecting the contestants'' (internal quotation marks omitted)).

[49] Historically, a shareholder's voting rights generally were exercised at a shareholder meeting. As discussed above, in passing the Securities Exchange Act, Congress understood that many companies had become held nationwide through dispersed ownership, at least in part facilitated by stock exchange listing of shares. Although voting rights in public companies technically continued to be exercised at a meeting, the votes cast at the meeting were by proxy and the voting decision was made during the proxy solicitation process. This structure persists to this day.

[50] The Commission's proxy rules have required shareholder proposals on certain matters to be included in company proxy materials since 1940 (*see* Release No. 34–2376 (January 12, 1940)), subject to amendment from time to time pursuant to the Commission's dynamic regulation of the proxy process.

[51] *See* 2003 Proposal; Shareholder Proposals Proposing Release; Election of Directors Proposing Release; and Election of Directors Adopting Release. *See also,* Section II, below, regarding the Commission's consideration of the proxy rules.

[52] *See, e.g.,* 2003 Staff Report and summary of comments in response to the Commission's May 1, 2003 solicitation of comments.

[53] Commenters on the 2003 Proposal discussed the range of options currently available. *See, e.g.,* comment letters from Ashland, Inc. (December 17, 2003) (''Ashland''); Conoco-Phillips (December 31, 2003); Delphi Corporation (December 10, 2003); Emerson Electric Co. (December 15, 2003); Financial Services Roundtable (December 22, 2003); Kerr-McGee Corporation (December 22, 2003) (''Kerr-McGee''); Independent Community Bankers of America (December 22, 2003); Letter Type D; Malcom S. Morris (November 6, 2003) (''Morris''); Office Depot, Inc. (December 22, 2003) (''Office Depot''); Valero Energy Corporation (December 18, 2003) (''Valero''); and Wachtell Lipton Rosen & Katz (November 14, 2003) (''Wachtell''). *Cf. Blasius,* 564 A.2d at 659 (''Generally, shareholders have only two protections against perceived inadequate business performance. They may sell their stock (which, if done in sufficient numbers, may so affect security prices as to create an incentive for altered managerial performance), or they may vote to replace incumbent board members.'').

[54] In the case of plurality voting, shareholders may vote in the election of directors for, or withhold authority to vote for, each nominee rather than vote for, against or abstain, as is the case for other matters to be voted on by shareholders. *See* Exchange Act Rule 14a–4(b)(2).

nominating committee); or they can propose a board nominee at a shareholder meeting. Each of these options has drawbacks that limit its effectiveness.[55]

a. Options Using the Proxy Process

Shareholders' existing options under the proxy rules to exercise their ownership rights are often criticized. The chief complaint from shareholders about the existing options is the high cost involved in mounting a proxy contest under the Commission's proxy rules. Because this cost must be borne by the shareholders undertaking the contest, the option generally is not used outside the corporate-control context, where the cost may be better justified.[56] A shareholder or group of shareholders that is dissatisfied with the leadership of a company generally, but is not seeking a change in control must, as a result of our proxy rules, nevertheless undertake a proxy contest, along with its related expenses and other burdens, to put nominees before the shareholders for a vote. The shareholder proposal process in Rule 14a–8, under which a company may be required to include a shareholder proposal in the company proxy materials, also has been criticized as an ineffective tool for exercising ownership rights, as Rule 14a–8 is not available for proposals that relate to director elections.[57] With regard to withhold vote and vote no campaigns, because some companies use plurality voting for board elections and therefore candidates can be elected regardless of whether they receive more than 50% of the shareholder vote, withhold vote campaigns may be limited in their effectiveness. In addition, restrictions under the proxy rules may limit the effectiveness of withhold vote and vote no campaigns because shareholders cannot solicit proxy authority through these campaigns.

Further, in any vote for the election of directors, customary election processes may serve to amplify the practical effect that the proxy rules have in impeding shareholder nominees.[58] In particular, as noted with regard to withhold vote campaigns, for companies using plurality rather than majority voting for board elections, nominees generally can be elected as director regardless of whether they receive a majority of the shareholder vote.[59] Therefore, in an election in which there are the same number of nominees as there are board positions open, each nominee receiving even a single vote will be elected, regardless of the number of votes withheld from a nominee.

b. Options Outside the Proxy Process

Shareholders also are critical of the options available to them outside the proxy process. The ''Wall Street Walk'' is not an optimal solution because it may not be practical for large institutional shareholders and others who follow a passive management or indexing strategy, and it may require investors to lock in a loss.[60] Selling shares may be very costly for these types of investors because they may face liquidity issues as a result of the size of their holdings and may be forced to sell their holdings in a manner that results in capital gains and therefore is not tax efficient. In addition, while selling shares may depress the stock price, leading to higher cost of capital for the firm and thus may ultimately spur management changes,[61] the investor who sold its shares will not benefit from any improvement that follows the management change.

Engaging management in a dialogue also may not be an effective option for shareholders because company management may be unresponsive to investor concerns.[62] While shareholders can recommend an individual for nomination as director to a company's nominating committee, we understand these recommendations are rarely accepted by nominating committees.[63] Moreover, in some cases, shareholders may not be able to exercise their state law rights effectively because they have had difficulty gaining access to members of company boards and their committees.[64]

Finally, given the near universal use of proxy voting and the inability of shareholders to use the company proxy to vote for shareholder nominees, it can be futile to nominate a director in person at a shareholder meeting.[65]

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[55] *See, e.g.,* comment letter on the 2003 Proposal from The Corporate Library (December 22, 2003) (''Corporate Library'') (''Shareholders can sell the stock at what they perceive to be a substantial discount. Or they can run their own slate of candidates, paying 100 percent of the costs, which may come to hundreds of thousands or even millions of dollars, for only a pro rata share of any increase in shareholder value as a result of the contested election. Meanwhile, management will spend the shareholders' money to fight them. This is not a level playing field. It is close to perpendicular.'').

[56] *See, e.g.,* Corporate Library. *See also* Bebchuk 2003 Article at 46. Surveying data from contested elections from 1996 to 2002, Professor Bebchuk concludes that ''the safety valve of potential ouster via the ballot is currently not working. In the absence of an attempt to acquire the company, the prospect of being removed in a proxy contest is far too remote to provide directors with incentives to serve shareholders.'' The principal reason the costs could be better justified in the corporate control context is because benefits that are expected to arise from a successful contest are internalized by the shareholder undertaking the contest.

[57] Exchange Act Rule 14a–8(i)(8).

[58] *See, e.g.,* Unofficial Transcript of the Security Holder Director Nominations Roundtable (March 10, 2004) (''2004 Roundtable Transcript''), comments of Ira M. Millstein, Weil, Gotshal & Manges, *available at: http://www.sec.gov/spotlight/dir-nominations/transcript03102004.txt.*

[59] Under plurality voting, the nominee with the greatest number of votes is elected. *But see* footnote 69, below (noting that some companies using a plurality standard have adopted policies requiring incumbent directors to resign if they receive less than majority support). Shareholders at companies using majority voting, or some other voting method other than plurality voting, may be better able to express dissatisfaction with a company's nominee or nominees. As discussed, in recent years, many companies have adopted a majority voting standard.

[60] *See* 2003 Summary of Comments, text at notes 9–10. Although the AFL–CIO noted that active managers of mutual funds can sell their shares in a company with an ''ineffective or unresponsive board,'' pension fund managers, including the AFL–CIO and Amalgamated Bank Longview Fund, noted that the issue of director accountability is more important to them because they may manage index funds that are necessarily long-term investors who cannot easily sell. *See* comment letters from American Federation of Labor and Congress of Industrial Organizations (December 19, 2003) (''AFL–CIO'') and Amalgamated Bank LongView Funds (December 21, 2003) (''LongView''). *See also* 2004 Roundtable Transcript, comments of Richard H. Moore, Treasurer of North Carolina.

[61] *See* 2004 Roundtable Transcript, comments of Peter J. Wallison, American Enterprise Institute.

[62] *See, e.g.,* comment letters on the 2003 Proposal from Lucian A. Bebchuk (December 22, 2003) (''Bebchuk''); California Public Employees' Retirement System (''CalPERS''); California State Teachers' Retirement System (''CalSTRS'') (December 4, 2003); Charles Capito (October 20, 2003); Council of Institutional Investors (''CII'') (December 12, 2003); Creative Investment Research (''CIR'') (December 22, 2003); Corporate Library; and Aaron Rosenthal (October 20, 2003).

[63] *See, e.g.,* Division of Corporation Finance, U.S. Securities and Exchange Commission, *Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors* (July 15, 2003), *available at: http://www.sec.gov/news/studies/proxyreport.pdf; see also,* comment letter on the 2003 Proposal from CII; and Michael E. Murphy, *The Nominating Process for Corporate Boards of Directors—A Decision-Making Analysis,* 5 Berkeley Bus. L.J. 131 (2008).

[64] *See, e.g.,* comment letter on the 2003 Proposal from CII; comment letter on 2007 Proposals from SEIU. *See also* Michael E. Murphy, *The Nominating Process for Corporate Boards of Directors—A Decision-Making Analysis,* 5 Berkeley Bus. L.J. 131 (2008). *See also* Division of Corporation Finance, U.S. Securities and Exchange Commission, *Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors* (July 15, 2003), *available at: http://www.sec.gov/news/studies/proxyreport.pdf.*

[65] *See* Unofficial Transcript of the Roundtable Discussion Regarding the Federal Proxy Rules and State Corporation Law (May 7, 2007), comments of Vice Chancellor Strine at 79 (commenting that ''this annual meeting thing could be a fix'' where the most active shareholder institutions gain representation on the board through other means such as through litigation settlement); *see generally,* 5 Fletcher Cyclopedia of Corporations § 2049.10 (Perm. Ed.) (''In large corporations, the shareholders' meeting is now only a necessary formality; the shareholders' expression can only be had by the statutory device of proxies and solicitation of proxies.'').

2. Recent Corporate Governance and Other Reforms

Over the past several years there have been a number of changes in corporate governance practices and the federal securities laws that may have mitigated some of the concerns expressed by commenters in 2003 and 2007 but, in our view, have not sufficiently addressed the central problem that we are seeking to solve—shareholders' limited ability to exercise their rights to nominate directors and have the nominations disclosed to and considered by the shareholders. For example, some commenters on the 2003 Proposal urged the Commission to defer action in order to assess the effectiveness of the then recently-enacted Sarbanes-Oxley Act of 2002 and other reforms, including enhanced director independence requirements and expansion of the nominating committee function at public companies.[66] Other commenters, while praising these reforms, doubted that they would be sufficient to address the problems that they hoped would be remedied through reform of the proxy process itself.[67] In particular, commenters in 2003 argued that objective independence standards for directors and the use of independent nominating committees, without more, may not counteract the perceived tendency of some boards to defer to management, given factors such as the significant personal relationships that can exist between directors and officers.[68] Therefore, shareholders may still want, but currently may not be able, to effectively nominate and elect directors that satisfy independence concerns specific to the companies in which they invest.

Since the 2003 Proposal, a number of other changes in the governance landscape have occurred, including a significant movement by larger companies toward majority voting rather than plurality voting in director elections,[69] and changes in state law to more expressly indicate that corporate governing documents may set out shareholders' right to nominate directors.[70] The Commission also has adopted changes to our rules, including enhanced disclosure requirements concerning nominating committees[71] and changes to our proxy rules to facilitate the use of electronic shareholder forums.[72] While these and other changes have been significant, after considering the views discussed throughout the release, we believe the federal proxy process could still be improved to further remove impediments to the exercise of shareholders' rights under state law to nominate directors.

II. Recent Commission Consideration of the Proxy Rules and Regulations Addressing the Election of Directors[73]

A. 2003 Review of the Proxy Process and Subsequent Rulemaking

In April 2003, the Commission directed the Division of Corporation Finance to review the proxy rules and regulations and interpretations regarding procedures for the nomination and election of corporate directors[74] and on May 1, 2003, the Commission solicited public input with respect to the Division's review.[75] Commenters generally supported the Commission's decision to review the proxy rules and regulations with respect to director nominations and elections and, in July 2003, the Division of Corporation Finance provided to the Commission its report and recommended changes to the proxy rules related to the nomination and election of directors.[76]

The Division recommended proposed changes in two areas: (1) Disclosure related to nominating committee functions and shareholder communications with boards of directors; and (2) enhanced shareholder access to the proxy process relating to the nomination of directors.[77] The Commission proposed and adopted the recommended disclosure requirements concerning nominating committee functions and shareholder communications with boards of directors.[78] In addition, in October 2003, the Commission proposed rules that would have created a mechanism for nominees of long-term shareholders, or groups of long-term shareholders, with significant shareholdings to be included in company proxy materials.[79]

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[66] *See, e.g.,* comment letter from American Bar Association (January 7, 2004) (''ABA'').

[67] 2004 Roundtable Transcript, comments of Nell Minow and Ralph V. Whitworth.

[68] *See generally,* Bebchuk. *See also In re Oracle Corp.,* 824 A.2d at 941. *See* footnote 42, above.

[69] The Corporate Library reports that as of December 2008, 49.5 percent of companies in the S&P 500 had made the switch to majority voting for director elections and another 18.4 percent had, while retaining a plurality standard, adopted a policy requiring that a director that does not receive majority support must submit his or her resignation. On the other hand, the plurality voting standard is still the standard at the majority of smaller companies in the Russell 1000 and 3000 indices, with 54.5 percent of companies in the Russell 1000 and 74.9 percent of the companies in the Russell 3000 still using a straight plurality voting standard. The Corporate Library Analyst Alert, December 2008. *See also* Broadridge letter dated March 27, 2009 and attached analysis in response to File No. SR–NYSE–2006–92 (stating that in calendar year 2007, 373 NYSE-listed companies had a majority vote standard for the election of directors).

[70] In *CA, Inc.* v. *AFSCME,* 953 A.2d 227 (Del. 2008), the Delaware Supreme Court held that shareholders can propose and adopt a bylaw regulating the process by which directors are elected. In light of this ruling, Delaware recently amended the Delaware General Corporation Law to add new Section 112, effective August 1, 2009, clarifying that the bylaws of a Delaware corporation may provide that, if the corporation solicits proxies with respect to an election of directors, the corporation may be required to include in its solicitation materials one or more individuals nominated by a stockholder in addition to the individuals nominated by the board of directors. The obligation of the corporation to include such stockholder nominees will be subject to the procedures and conditions set forth in the bylaw adopted under Section 112. Delaware also added new Section 113, which will allow a Delaware corporation's bylaws to include a provision that the corporation, under certain circumstances, will reimburse a stockholder for the expenses incurred in soliciting proxies in connection with an election of directors. In addition, the American Bar Association's Committee on Corporate Laws, which is responsible for the Model Business Corporation Act, is considering similar changes to the Model Act. *See* American Bar Association, Section of Business Law, ''Corporate Laws Committee To Address Current Governance Issues,'' April 29, 2009 (noting that Delaware's recent statutory amendments ''are being actively considered by the Committee'') (*available at: http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=662*). Thirty states have adopted all or substantially all of the Model Act as their general corporation statute.

Also, in 2007, North Dakota amended its corporate code to permit five percent shareholders to provide a company notice of intent to nominate directors and require the company to include each such shareholder nominee in its proxy statement and form of proxy. N.D. Cent. Code § 10–35–08 (2009); *see* North Dakota Publicly Traded Corporations Act, N.D. Cent. Code section 10–35 *et al.* (2007).

[71] *See Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors,* Release No. 33–8340 (December 11, 2003) [68 FR 69204].

[72] *See Electronic Shareholder Forums,* Release No. 34–57172 (January 18, 2008) [73 FR 4450] (''Electronic Shareholder Forums Release'').

[73] The Commission also has considered the topic on at least three earlier occasions—in 1942, 1977, and 1992. For a discussion, *see* 2003 Proposal.

[74] *See* Press Release No. 2003–46 (April 14, 2003).

[75] *See* Release No. 34–47778 (May 1, 2003) [68 FR 24530] and comment file number S7–10–03.

[76] *See* Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors, Division of Corporation Finance (July 15, 2003) (''2003 Staff Report''), *available at: http://www.sec.gov/news/studies/proxyrpt.htm. See also* Summary of Comments in Response to the Commission's Solicitation of Public Views Regarding Possible Changes to the Proxy Rules (July 15, 2003), attached as Appendix A to the Staff Report.

[77] *See* 2003 Staff Report.

[78] *Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors,* Release No. 33–8340 (December 11, 2003) [68 FR 69204].

[79] *See* 2003 Proposal. The proposal would have required shareholders to have held the requisite amount of securities to meet the ownership

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The proposed new rules were intended to address perceived inadequacies in the proxy process with respect to director nominations and elections.[80] The proposal generated significant public comment, with shareholders generally supporting adoption of rules that would facilitate their right to nominate directors and companies and their advisors generally opposing such rules because of concerns that a requirement to include shareholder director nominees in the company's proxy materials would impede the proper functioning of boards and cause inefficiencies.[81] The Commission did not adopt final rules based on the proposal.

B. 2007 Rulemaking Concerning Shareholder Proposals Seeking to Establish Bylaw Procedures for Shareholder Director Nominations

One of the means that shareholders use to express their views on the management and affairs of a company is through shareholder proposals, which are addressed in Rule 14a–8. Rule 14a–8 provides shareholders with an opportunity to place a proposal in a company's proxy materials for a vote at an annual or special meeting of shareholders. Under this rule, a company generally is required to include the proposal unless the shareholder has not complied with the rule's procedural requirements or the proposal falls within one of the rule's 13 substantive bases for exclusion. One of the substantive bases that a company may rely on in excluding a shareholder proposal is Rule 14a–8(i)(8), which addresses shareholder proposals concerning director elections.[82] This provision frequently is referred to as the ''election exclusion.'' In interpreting this provision, the Commission took the position in 2007 that Rule 14a–8(i)(8) permits exclusion of a proposal that would establish a procedure that may result in contested elections to the board.[83]

In 2006, the U.S. Court of Appeals for the Second Circuit, in *American Federation of State, County and Municipal Employees, Employees Pension Plan* v. *American International Group, Inc.,*[84] held that AIG could not rely on Rule 14a–8(i)(8) to exclude a shareholder proposal that, if adopted, would have amended AIG's bylaws to require the company, under specified circumstances, to include shareholder nominees for director in the company's proxy materials at subsequent meetings. The Second Circuit interpreted the language of the rule[85] and the Commission's statements in adopting the rule in 1976 as limiting the election exclusion ''to shareholder proposals used to oppose solicitations dealing with an identified board seat in an upcoming election and reject[ing] the somewhat broader interpretation that the election exclusion applies to shareholder proposals that would institute procedures making such election contests more likely.''[86] The effect of the *AFSCME* decision was to permit the bylaw proposal to be included in company proxy materials and, had the bylaw been approved by shareholders, for subsequent election contests conducted under it to take place in the company's proxy materials without compliance with the disclosure requirements applicable to election contests under the Commission's other proxy rules.[87] The Commission was concerned that the Second Circuit's decision resulted in uncertainty and confusion with respect to the appropriate application of Rule 14a–8(i)(8), and that it could lead to contested elections for directors without the disclosure otherwise required under the proxy rules for contested elections.[88] This concern led the Commission to reopen the issue of shareholder involvement in the nomination and election process.[89]

In May 2007, the Commission hosted three roundtables on the proxy process during which a number of individuals and representatives from the public and private sector focused on the relationship between the proxy rules and state corporate law,[90] proxy voting mechanics,[91] and shareholder proposals.[92] Following the roundtables, in July 2007, the Commission published for comment two alternative proposals addressing the election exclusion in Rule 14a–8. The first would have amended Rule 14a–8 to enable

threshold for two years as of the date of the nomination.

[80] *See* 2003 Proposal (explaining that the proposal would ''apply only in those instances where criteria suggest that the company has been unresponsive to security holder concerns as they relate to the proxy process'').

[81] *See* 2003 Summary of Comments.

[82] Rule 14a–8(i)(8) provides that a company need not include a proposal that ''relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election[.]''

[83] *See* Election of Directors Adopting Release (citing Commission statements made in Release No. 34–12598 (July 7, 1976) (''[T]he principal purpose of [Rule 14a–8(i)(8)] is to make clear, with respect to corporate elections, that Rule 14a–8 is not the proper means for conducting campaigns or effecting reforms in elections of that nature, since other proxy rules, including Rule 14a–[12], are applicable thereto.'')). *See also* Division of Corporation Finance no-action letters to *Citigroup, Inc.* (January 31, 2003) and *AOL Time Warner* (February 29, 2003). As noted in the Election of Directors Proposing Release, in each of 1993 and 1995, the Division issued one letter that took a contrary view. *See Dravo Corp.* (February 21, 1995); and *Pinnacle West Capital Corp.* (March 26, 1993) (not permitting exclusion under Rule 14a–8(i)(8) of proposals seeking to include qualified nominees in the company's proxy statement).

[84] 462 F.3d 121 (2d Cir. 2006) (*AFSCME*).

[85] At the time of the *AFSCME* decision, Rule 14a–8(i)(8) provided that a company need not include a proposal that ''relates to an election for membership on the company's board of directors or analogous governing body.'' *See id.* at 125. This language was amended in 2007. *See* Election of Directors Adopting Release.

[86] 462 F.3d at 128.

[87] Exchange Act Rule 14a–12(c) [17 CFR 240.14a–12(c)] defines an election contest as ''[s]olicitations by any person or group of persons for the purposes of opposing a solicitation subject to this regulation by any other person or group of persons with respect to the election or removal of directors at any annual or special meeting of security holders * * *.'' Items 4(b) and 5(b) of Exchange Act Schedule 14A set out special disclosure requirements for solicitations subject to Rule 14a–12(c).

[88] *See* Election of Directors Proposing Release. In this regard, the Commission was concerned that shareholders and companies would be unable to know with certainty whether a proposal that could result in an election contest may be excluded under Rule 14a–8(i)(8), depending on where the company was incorporated or conducting business, and that the staff would be severely limited in their ability to interpret Rule 14a–8 in responding to companies' notices of intent to exclude shareholder proposals.

[89] Although the Second Circuit's decision was binding only within that Circuit, it created uncertainty elsewhere about the continuing validity of the interpretation of Rule 14a–8(i)(8). After the *AFSCME* decision and prior to the Commission's codification of the interpretation in December 2007, the staff of the Division of Corporation Finance received three no-action requests seeking to exclude similar proposals under Rule 14a–8(i)(8). In *Hewlett-Packard* (January 22, 2007), the staff took a position of ''no view'' on the company's request for no-action relief. A second request for no-action relief was submitted by Reliant Energy. Subsequent to the staff of the Division of Corporation Finance taking a ''no view'' position on Hewlett-Packard's request, Reliant Energy filed a complaint in the U.S. District Court for the Southern District of Texas seeking a declaratory judgment that the company could properly omit a similar proposal that it had received for inclusion in its proxy materials. During the pendency of this litigation and prior to the staff's response to Reliant's no-action request, the shareholder withdrew the proposal and the company therefore withdrew its no-action request. (*See Reliant Energy, Inc.* (February 23, 2007)). A third request for no-action relief from UnitedHealth Group, Inc. was withdrawn after the company agreed to include the proposal in its proxy materials. (*See UnitedHealth Group, Inc.* (March 29, 2007)).

[90] Roundtable on the Federal Proxy Rules and State Corporation Law (May 7, 2007). Materials related to the roundtable, including an archived broadcast and a transcript of the roundtable, are *available at: http://www.sec.gov/spotlight/proxyprocess.htm.*

[91] Roundtable on Proxy Voting Mechanics (May 24, 2007). Materials related to the roundtable, including an archived broadcast and a transcript of the roundtable, are *available at: http://www.sec.gov/spotlight/proxyprocess.htm.*

[92] Roundtable on Proposals of Shareholders (May 25, 2007). Materials related to the roundtable, including an archived broadcast and a transcript of the roundtable, are *available at: http://www.sec.gov/spotlight/proxyprocess.htm.*

shareholders to include proposals on shareholder director nomination bylaws in company proxy materials where certain conditions were met.[93] The conditions that could be included in such a proposal would not have been limited under the rule proposal so long as they complied with applicable state law and governing corporate documents. As noted in the proposing release, the goal underlying the proposal was to better align the proxy rules with shareholders' rights under state law, in particular the right to nominate directors. The Commission's alternative proposal sought to amend Rule 14a–8 so that a shareholder nomination bylaw proposal could be excluded by a company.[94] The Commission adopted this proposal in December 2007 to provide certainty to companies and shareholders in light of the *AFSCME* decision.[95] The Commission did not take final action on the first proposal, with the exception of the portion of the first proposal intended to facilitate the creation and use of electronic shareholder forums, which the Commission adopted in January 2008.[96]

III. Proposed Changes to The Proxy Rules

A. Introduction

We are proposing amendments to the proxy rules to require companies to include disclosures about shareholder nominees for director in the companies' proxy materials, under certain circumstances, so long as the shareholders are not seeking to change the control [97] of the issuer or to gain more than a limited number of seats on the board. These proposed amendments build on the Commission's 2003 and 2007 proposals. They also reflect our experience with, and continued consideration of, the issue of shareholder involvement in the proxy process, the interaction between the proxy rules and state law, and the extensive comment that we have received over the past six years on these topics. As stated previously, due to dispersed ownership, director elections are largely conducted by proxy rather than in person and, as a result, impediments that the Federal proxy rules create to shareholders nominating directors through the proxy process translate into the inability of shareholders to effectively exercise their rights to nominate and to elect those directors. We believe the proposed rule changes will provide shareholders with a greater voice and an avenue to exercise the rights they have to effect change on the boards of the companies in which they invest that they no longer can exercise effectively through attending a shareholder meeting in person.

The Commission's proposals would provide shareholders with two ways to more fully exercise their rights to nominate directors. First, we are proposing a new proxy rule (Exchange Act Rule 14a–11) that would, under certain circumstances, require companies to include shareholder nominees for director in the companies' proxy materials. This requirement would apply unless state law or a company's governing documents[98] prohibits shareholders from nominating directors.[99] In this regard, state law or a company's governing documents may provide for nomination or disclosure rights in addition to those provided pursuant to Rule 14a–11 (*e.g.,* a company could choose to provide a right for shareholders to have their nominees disclosed in the company's proxy materials regardless of share ownership—in that instance, the company's provision would apply for certain shareholders who would not otherwise have their nominees included in the company's proxy materials pursuant to Rule 14a–11). Second, we are proposing an amendment to Exchange Act Rule 14a–8(i)(8), the election exclusion, to preclude companies from relying on Rule 14a–8(i)(8) to exclude from their proxy materials shareholder proposals by qualifying shareholders that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11.

Request for Comment

A.1. Does the Commission need to facilitate shareholder director nominations or remove impediments to help make the proxy process better reflect the rights a shareholder would have at a shareholder meeting?

A.2. Should the Commission adopt revisions to the proxy rules to facilitate the inclusion of shareholder nominees in company proxy materials, or are the existing means that are available to shareholders to exercise their rights to nominate directors adequate? How have changes in corporate governance over the past six years, including the move by many companies away from plurality voting to majority voting, affected a shareholder's ability to place nominees in company proxy materials? How have other developments, as well as ongoing developments such as some states adopting statutes allowing companies to reimburse shareholders who conduct director election contests and enabling companies to include in their bylaws provisions for inclusion of shareholder director nominees in company proxy materials, affected a shareholder's ability to nominate directors? Have other changes in law or practice created a greater or lesser need for such a rule?

A.3. Would the proposed amendments enable shareholders to effect change in a company's board of directors? Please explain and provide any empirical data in support of any arguments or analyses.

A.4. What would be the costs and benefits to companies and shareholders if the Commission adopted new proxy rules that would facilitate the inclusion of shareholder director nominees in company proxy materials? What would be the costs and benefits to companies if the Commission adopted the proposed amendment to Rule 14a–8(i)(8)?

A.5. What direct or indirect effect, if any, would the proposed changes to the proxy rules have on companies' corporate governance policies relating to the election of directors?

A.6. Could the proposed amendments to the proxy rules be modified to better meet the Commission's stated intent? If so, how? Please explain and provide empirical data or other specific information in support of any arguments or analyses. Please identify and discuss any other rules that would need to be amended.

A.7. We note concerns regarding investor confidence. Would amending the proxy rules as proposed help restore investor confidence? Why or why not? Please explain and provide empirical data or other specific information in support of any arguments or analyses.

A.8. We also note concerns about board accountability and shareholder participation in the proxy process. Would the proposed amendments to the proxy rules address concerns about board accountability and shareholder

[93] *See* Shareholder Proposals Proposing Release.

[94] *See* Election of Directors Proposing Release.

[95] *See* Election of Directors Adopting Release.

[96] *See* Electronic Shareholder Forums Release.

[97] A change in control could include any number of extraordinary transactions, including a sale of substantially all of the company's assets. *See, e.g.,* Item 14(a) of Schedule 14A.

[98] Under state law, a company's governing documents may have various names. When we refer to governing documents throughout the release, we generally are referring to a company's charter, articles of incorporation, certificate of incorporation, and/or bylaws, as applicable.

[99] We are not aware of any law in any state or in the District of Columbia that prohibits shareholders from nominating directors. Nonetheless, should any such law be enacted in the future, then this condition would not be satisfied.

participation on the one hand, and board dynamics, on the other? If so, how? If not, why not? Please explain and provide empirical data in support of any arguments or analyses.

A.9. Would adoption of only proposed Rule 14a–11 meet the Commission's stated objectives? If so, why? If not, why not? What modifications to the proposed rule and related disclosure requirements would be necessary, if any?

A.10. Would adoption of only the proposed amendment to Rule 14a–8(i)(8) and the related disclosure requirements meet the Commission's stated objectives? If so, why? If not, why not? What modifications to the proposed rule amendment and related disclosure requirements would be necessary, if any?

A.11. Would other revisions to our proxy rules achieve the same or similar objectives as the Commission's proposal? For example, regardless of what other action the Commission may take in this area, should we adopt new disclosure requirements and liability provisions to address recent changes in some state laws concerning the inclusion of shareholder nominees for director in company proxy materials pursuant to a company's governing documents?

A.12. Are there any states that prohibit, or permit companies to prohibit, shareholders from nominating a candidate or candidates for election as director?

B. Proposed Exchange Act Rule 14a–11

1. Overview

As discussed, currently, a shareholder or group of shareholders must undertake a proxy contest and incur the related expenses to have any reasonable chance at successfully putting director nominees before the shareholders for a vote. A board's nominees, on the other hand, are listed in the company's proxy materials, which are funded out of corporate assets.

We believe it is an appropriate time for us to revisit whether and how the federal proxy rules may be impeding the ability of shareholders to exercise their fundamental rights to nominate and elect board members. As mentioned above, we are aware of the concerns and questions about the accountability and responsiveness of some companies and boards of directors to the interests of shareholders, particularly in the current market environment. Additionally, based on the comments received in response to our solicitation of public input on the topic in prior releases and roundtables, we have learned that shareholders face significant obstacles to efficiently exercising their right to determine the leadership of the companies in which they invest. Much of the public input that we have received suggests that including shareholder nominees for director in company proxy materials would be the most direct and effective method of facilitating shareholders' rights in connection with the nomination and election of directors.[100]

On the other hand, the business community and many of its legal advisors have expressed concern that mandating shareholder access to company proxy materials could turn every election of directors into a contest, which would be costly and disruptive to companies and could discourage some qualified board candidates from agreeing to appear on a company's slate of nominees. Because the composition of the board of directors is fundamental to a company's governance, the current filing and other requirements applicable to shareholders who wish to propose an alternate slate are, in the view of these commenters, more appropriate than including shareholder nominees for director in company proxy materials.[101]

In light of the erosion of investor confidence that has taken place over the past several months, and after further consideration of the issue, we have determined to propose a rule that would require companies to include disclosure about shareholder nominees for director in company proxy materials under specified conditions.[102] These nominees would then also be included on a company's form of proxy in accordance with the requirements of Rule 14a–4.[103] Rule 14a–11 would not apply where shareholders relying on the rule are seeking to change the control of the issuer or to gain more than a limited number of seats on the board of directors. In this regard, we believe that shareholders who are seeking such a change should continue to use the procedures currently available for election contests.

2. Application of Exchange Act Rule 14a–11

Proposed Rule 14a–11 would apply to all companies subject to the Exchange Act proxy rules [104] (including investment companies registered under Section 8 of the Investment Company Act of 1940),[105] other than companies that are subject to the proxy rules solely because they have a class of debt registered under Section 12 of the Exchange Act. As proposed, a company would be subject to Rule 14a–11 unless applicable state law or a company's governing documents prohibits shareholders from nominating candidates for the board of directors. When a company's governing documents do prohibit nomination rights, shareholders who want to amend the provision may seek to do so by submitting a shareholder proposal.[106]

In the 2003 Proposal, the Commission proposed to make the new requirement concerning shareholder director nominations operative for a company only after the occurrence of one or both of two possible triggering events. The first triggering event was that at least one of the company's nominees for the board of directors for whom the company solicited proxies received withhold votes from more than 35% of the votes cast at an annual meeting of shareholders at which directors were elected (provided, that this triggering event could not occur in a contested election to which Rule 14a–12(c) would apply or an election to which the proposed shareholder nomination procedure would have applied). The second proposed triggering event was that a shareholder proposal submitted under Rule 14a–8 providing that the company become subject to the proposed shareholder nomination procedure was submitted for a vote of shareholders at an annual meeting by a shareholder or group of shareholders that (1) held more than 1% of the company's securities entitled to vote on the proposal and (2) held those securities for one year as of the date the proposal was submitted, and the proposal received more than 50% of the votes cast on that proposal at that meeting.[107]

Today's proposal does not require a triggering event. Instead, Rule 14a–11 would apply to all companies subject to

[100] *See* 2003 Summary of Comments.

[101] *See id.*

[102] *See* proposed Exchange Act Rule 14a–11.

[103] *See* proposed amendment to Rule 14a–4.

[104] Exchange Act Rule 3a12–3 [17 CFR 240.3a12–3] exempts foreign private issuers from the Commission's proxy rules. As such, the proposed rule would not apply to foreign private issuers.

[105] 15 U.S.C. 80a *et seq.* Investment companies currently are required to comply with the proxy rules under the Exchange Act when soliciting proxies, including proxies relating to the election of directors. *See* Investment Company Act Rule 20a–1 [17 CFR 270.20a–1] (requiring registered investment companies to comply with regulations adopted pursuant to Section 14(a) of the Exchange Act that would be applicable to a proxy solicitation if it were made in respect of a security registered pursuant to Section 12 of the Exchange Act).

[106] A company generally would not be permitted to exclude such a shareholder proposal under our proposed amendment to Rule 14a–8(i)(8), discussed in Section III.C., below.

[107] Only votes for and against a proposal would have been included in the calculation of the shareholder vote.

Exchange Act Section 14(a), other than companies that are subject to the proxy rules solely because they have a class of debt registered under Exchange Act Section 12. Accordingly, a company would be required to disclose the nominee or nominees of any shareholder or shareholder group meeting the proposed eligibility standards and other conditions in Rule 14a–11, discussed below. Our decision not to include triggering events in the current proposal reflects our concern that the federal proxy rules may be impeding the exercise of shareholders' ability under state law to nominate directors at all companies, not just those with demonstrated governance issues. In addition, we note that many commenters on the 2003 Proposal expressed concern about that proposal's complexity [108] and indicated that the multi-year process created by the trigger requirement could make it more difficult for shareholders to efficiently effect change in the composition of boards of directors.[109] Finally, in light of our concerns about restoring investor confidence to the greatest number of shareholders as quickly as possible, we do not want to add a layer of complexity and delay to the operation of the proposed rule that would frustrate our stated objectives.

Request for Comment

B.1. Would adoption of Rule 14a–11 conflict with any state law, federal law, or rule of a national securities exchange or national securities association? To the extent you indicate that the rule would conflict with any of these provisions, please be specific in your discussion of those provisions that you believe would conflict. How should the Commission address these conflicts? Should the rule also address conflicts with a company's country of incorporation where the company is organized in a non-U.S. jurisdiction but does not meet the definition of foreign private issuer? Should the rule also explicitly refer to conflicts with laws of U.S. possessions or territories?

B.2. Should Rule 14a–11 apply as proposed? Is it appropriate for proposed Rule 14a–11 to be unavailable where state law or a company's governing documents prohibit shareholders from nominating candidates for director? Would the proposed rule effectively facilitate shareholders' basic rights, particularly the right to nominate directors?

B.3. As proposed, Rule 14a–11 would apply to all companies subject to the proxy rules, other than companies that are subject to the proxy rules solely because they have a class of debt registered under Exchange Act Section 12. What effect, if any, will this application have on any particular group of companies (*e.g.,* on smaller reporting companies)? Are there modifications that would accommodate the needs of a particular group of companies (*e.g.,* smaller reporting companies) while accomplishing the goals of the proposal? Would it instead be more appropriate to exclude from operation of the procedure smaller reporting companies, either on a temporary basis through staggered compliance dates based on company size, or on a permanent basis? Should any other groups of companies be excluded from operation of the rule (*e.g.,* companies subject to the proxy rules for less than a specified period of time (*e.g.,* one year, two years, or three years))? If so, for what period of time should the companies be excluded from operation of the rule (*e.g.,* one year, two years, three years, permanently)?

B.4. Should proposed Rule 14a–11 apply to registered investment companies? Are there any aspects of the proposed nomination procedure that should be modified in the case of registered investment companies?

B.5. Should companies that are subject to the proxy rules solely because they have a class of debt registered under Exchange Act Section 12 be excluded from application of Rule 14a–11, as proposed? Please explain why or why not.

B.6. As proposed, Rule 14a–11 would apply to companies that have voluntarily registered a class of equity securities pursuant to Exchange Act Section 12(g). Should companies that have registered on a voluntary basis be subject to Rule 14a–11? If so, should nominating shareholders of these companies be subject to the same ownership eligibility thresholds as those shareholders of companies that were required to register a class of equity securities pursuant to Section 12? Should we adjust any other aspects of Rule 14a–11 for companies that have voluntarily registered a class of equity securities pursuant to Section 12(g)?

B.7. Should proposed Rule 14a–11 be inapplicable to a company that has or adopts a provision in its governing documents that provides for or prohibits the inclusion of shareholder director nominees in the company proxy materials? Should the Commission's rules respond to variations in shareholder director nomination disclosures and procedures adopted, for example, under state corporate laws that specify that a company's governing documents may address the use of a company's proxy materials for shareholder nominees to the board of directors? Would it be more appropriate to only permit companies to comply with governing document provisions or state laws where those provisions or laws provide shareholders with greater nomination or proxy disclosure rights than those provided under proposed Rule 14a–11? Should Rule 14a–11 provide that a company's governing documents may render the rule inapplicable to a company only if the shareholders have approved, as contrasted to the board implementing without shareholder approval, a provision in the company's governing documents addressing the inclusion of shareholder nominees in company proxy materials? Should Rule 14a–11 be inapplicable if such shareholder-approved provisions are more restrictive than Rule 14a–11? Should Rule 14a–11 be inapplicable if such shareholder-approved provisions are less restrictive than Rule 14a–11? Or both?

B.8. The New York Stock Exchange has filed with the Commission a proposed rule change to amend NYSE Rule 452 and corresponding Section 402.08 of the Listed Company Manual to eliminate broker discretionary voting for the election of directors. The Commission published the proposed rule change, as amended on February 26, 2009, for comment in the Federal Register on March 6, 2009.[110] If the amendment to Rule 452 is approved, what would be its effect on operation of proposed Rule 14a–11? Would any changes to Rule 14a–11 be required? Please be specific in your response.

B.9. Should proposed Rule 14a–11 exempt companies where state law or the company's governing documents require that directors be elected by a majority of shares present in person or represented by proxy at the meeting and entitled to vote? What specific issues would arise in an election where state law or the company's governing documents provided for other than plurality voting (*e.g.,* majority voting)? What specific issues would arise in an election that is conducted by cumulative voting? Would these issues need to be addressed in revisions to the proposed rule text? If so, how?

B.10. Should companies be able to take specified steps or actions, such as

[108] *See* 2003 Summary of Comments and Letter Type I from 5,858 individuals or entities.

[109] *See* 2003 Summary of Comments; *see also* comment letter from American Federation of State, County, and Municipal Employees (September 24, 2003) (''AFSCME 2003'').

[110] *See* Release No. 34–59464 (February 26, 2009) [74 FR 9864].

adopting a majority vote standard or bylaw specifying procedures for the inclusion of shareholder nominees in company proxy materials, to prevent application of proposed Rule 14a–11 where it otherwise would apply? If so, what such steps or actions would be appropriate and why would they be appropriate? For example, should companies that agree with a shareholder proponent not to exclude a shareholder proposal submitted by an eligible shareholder pursuant to Rule 14a–8 be exempted from application of the proposed rule for a specified period of time? Should a company that implements any shareholder proposals that receive a majority of votes cast in a given year be exempted?

B.11. Should companies subject to Rule 14a–11 be permitted to exclude certain shareholder proposals that they otherwise would be required to include? If so, what categories of proposals? For example, should the company be able to exclude proposals that are non-binding, proposals that relate to corporate governance matters generally, proposals that relate to the structure or composition of boards of directors, or other proposals?

B.12. One concern that has been raised about the effectiveness of the present proxy rules is the high cost to a shareholder to conduct a solicitation to nominate a director. Should the proposed rule provide that it does not apply to a company whose governing documents include a provision for reimbursement of expenses incurred by a participant or participants in the course of a solicitation in opposition as defined in Rule 14a–12(c)? If so, should the rule specify what manner of reimbursement would be sufficient for proposed Rule 14a–11 not to apply?

B.13. Should Rule 14a–11 be widely available, as proposed, or should application of the rule be limited to companies where specific events have occurred to trigger operation of the rule? If so, what events should trigger operation of the rule?

B.14. If the Commission were to include triggering events in Rule 14a–11, would either of the triggering events proposed in 2003 and described above be appropriate? In responding, please discuss how any changes in corporate governance practices over the past six years have affected the usefulness of the triggering events proposed in 2003. For example, over the past six years many companies have adopted majority voting. If the triggering events proposed in 2003 are not appropriate, are there alternative events that the Commission should consider in place of, or in addition to, the above events? For example, should application of Rule 14a–11 be triggered by other factors such as economic performance (*e.g.,* lagging a peer index for a specified number of consecutive years), being delisted by an exchange, being sanctioned by the Commission or other regulators, being indicted on criminal charges, having to restate earnings, having to restate earnings more than once in a specified period, or failing to take action on a shareholder proposal that received a majority shareholder vote?

B.15. In the 2003 Proposal, the rule proposed would have been triggered by withhold votes for one or more directors of more than 35% of the votes cast. Is it appropriate to apply such a trigger to current proposed Rule 14a–11? If so, what would be an appropriate percentage and why? Would it be appropriate to base this trigger on votes cast rather than votes outstanding? Please provide a basis for any alternate recommendations, including numeric data, where available. Is the percentage of withhold votes the appropriate standard in all cases? For example, what standard is appropriate for companies that do not use plurality voting? If your comments are based upon data with regard to withhold votes for individual directors, please provide such data in your response.

B.16. If the Commission were to include a triggering event requirement, for what period of time after a triggering event should Rule 14a–11 apply (*e.g.,* one year, two years, three years, or permanently)? Should there be a means other than the adoption of a provision in the company's governing documents for the company or shareholders to terminate application of the requirement at a company? If so, what other means would be appropriate?

B.17. What would be the possible consequences of the use of triggering events? Would the withhold vote trigger result in more campaigns seeking withhold votes? How would any such consequences affect the operation and governance of companies?

B.18. If the proposed requirement applied only after a specified triggering event, how would the company make shareholders aware when a triggering event has occurred? If the rule became operative based on the occurrence of triggering events, should the rule require additional disclosures in a company's Exchange Act Form 10–Q,[111] 10–K,[112] or 8–K [113] or, in the case of a registered investment company, Form N–CSR? [114] For example, the rule could require the following:

- A company would be required to disclose the shareholder vote with regard to the directors receiving a withhold vote or a shareholder proposal, either of which may result in a triggering event, in its quarterly report on Form 10–Q for the period in which the matter was submitted to a vote of shareholders or, where the triggering event occurred during the fourth quarter of the fiscal year, on Form 10–K; [115] and
- A company would be required to include in that Form 10–Q or 10–K information disclosing that it would be subject to Rule 14a–11 as a result of such vote, if applicable.

B.19. Should the company's disclosure regarding the applicability of Rule 14a–11 be filed or made public in some other manner? If so, what manner would be appropriate?

B.20. Should companies be exempted from complying with Rule 14a–11 for any election of directors in which another party commences or evidences its intent to commence a solicitation in opposition subject to Rule 14a–12(c) prior to the company mailing its proxy materials? What should be the effect if another party commences a solicitation in opposition after the company has mailed its proxy materials?

B.21. If a triggering event is required and companies are exempted from complying with Rule 14a–11 because another party has commenced or evidenced its intent to commence a solicitation in opposition subject to Rule 14a–12(c), should the period in which Rule 14a–11 applies be extended to the next year? What should be the effect if another party commences a solicitation in opposition after the company has mailed its proxy materials?

B.22. What provisions, if any, would the Commission need to make for the transition period after adoption of a rule based on this proposal? Would it be necessary to adjust the timing requirements of the rule depending on the effective date of the rule (*e.g.,* if the rules are adopted shortly before a proxy season)?

B.23. Should the Commission consider rulemaking under Section 19(c) of the Exchange Act to amend the

[111] 17 CFR 249.308a.

[112] 17 CFR 249.310.

[113] 17 CFR 249.308.

[114] 17 CFR 249.331 and 17 CFR 274.128.

[115] Item 4 of Part II to Exchange Act Form 10–Q and Item 4 of Part I to Exchange Act Form 10–K currently require that companies disclose the results of the voting on all matters submitted to a vote of shareholders during the period covered by the report. We could add a provision to these items that would require disclosure of specific information relating to the application of Rule 14a–11 or a shareholder director nomination process provided for under applicable state law or in a company's governing documents.

listing standards of registered exchanges to require that shareholders have access to the company's proxy materials to nominate directors under the requirements and procedures described in connection with proposed Rule 14a–11 to reflect, for example, changes the Sarbanes-Oxley Act made to director and independence requirements, among other matters?

3. Eligibility To Use Exchange Act Rule 14a–11

In seeking to balance shareholders' ability to participate more fully in the nomination and election process against the potential cost and disruption to companies subject to the proposed new rule, we are proposing that only holders of a significant, long-term interest in a company be able to rely on Rule 14a–11 to have disclosure about their nominees for director included in company proxy materials. We are proposing that the requirement for a company to include a shareholder's nominee or nominees for director in the company's proxy materials and on its form of proxy be based on a minimum ownership threshold, which would be tiered according to company size. Assuming the other conditions of proposed Rule 14a–11 are met, companies would not be able to exclude a shareholder nominee or nominees if the nominating shareholder or group:

- Beneficially owns, as of the date of the shareholder notice on Schedule 14N, either individually or in the aggregate: [116]
- For large accelerated filers as defined in Exchange Act Rule 12b–2,[117] and registered investment companies with net assets of $700 million or more, at least 1% of the company's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders); [118]
- For accelerated filers as defined in Rule 12b–2, and registered investment companies with net assets of $75 million or more but less than $700 million, at least 3% of the company's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders); [119] and
- For non-accelerated filers as defined in Rule 12b–2, and registered investment companies with net assets of less than $75 million, at least 5% of the company's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders); [120]
- Has beneficially owned the securities that are used for purposes of determining the ownership threshold continuously for at least one year as of the date of the shareholder notice on Schedule 14N (in the case of a shareholder group, each member of the group must have held the securities that are used for purposes of determining the ownership threshold for at least one year as of the date of the shareholder notice on Schedule 14N); [121] and
- Represents that it intends to continue to own those securities through the date of the annual or special meeting.[122]

The issue of the appropriate eligibility ownership threshold generated a great deal of comment when proposed in the 2003 Proposal.[123] While some commenters believed that all shareholders, regardless of the amount of shares owned, should be able to include nominees in the company proxy materials for the purpose of nominating one or more directors, others advocated share ownership thresholds ranging from the $2,000 threshold required to submit a Rule 14a–8 proposal to share ownership percentages such as 3%, 5% or 10% of a company's outstanding common stock.[124] Those who advocated no threshold or a nominal dollar amount argued that the imposition of a threshold would discriminate against smaller investors or unfairly advantage larger shareholders who already may have the resources to run their own slates using the existing rules for contested elections.[125] Those who advocated a larger share ownership threshold argued that a nominating shareholder should have a substantial, long-term stake in the company in order to require the use of company funds to nominate a candidate.[126] In addition, advocates of a larger share ownership threshold pointed out that the composition of the board of directors is critical to a corporation's functions and, accordingly, shareholders should have to evidence a significant financial interest by satisfying a substantial ownership threshold in order to require a company to include in its proxy materials a shareholder director nominee or nominees.[127]

The tiered beneficial ownership thresholds that we are proposing represent an effort to balance the varying considerations and address the possibility that certain companies could be impacted disproportionately based on their size.[128] In determining the proposed ownership thresholds, we considered two different samples of data on security ownership as an indicator of the ownership of securities that are entitled to be voted on the election of directors. First, we considered the current ownership make-up of a sample provided by an outside source of 5,327 companies that have held meetings between January 1, 2008 and April 15, 2009.[129] In this sample, roughly 26% of the firms are classified as large accelerated filers, 35% are classified as accelerated filers, and 38% are classified as non-accelerated filers. The second sample is derived from CDA Spectrum and is based on filings of Forms 13F in the third quarter of 2008.[130] In this sample, roughly 26% of the firms are classified as large accelerated filers, 33% are classified as accelerated filers, and 40% are classified as non-accelerated filers.[131]

[116] The manner in which a nominating shareholder or group would establish its eligibility to use proposed Rule 14a–11 is discussed further, below.

[117] 17 CFR 240.12b–2.

[118] *See* proposed Rule 14a–11(b)(1)(i).

[119] *See* proposed Rule 14a–11(b)(1)(ii).

[120] *See* proposed Rule 14a–11(b)(1)(iii).

[121] *See* proposed Rule 14a–11(b)(2). The one-year holding period requirement applies only to the securities that are used for purposes of determining the ownership threshold.

[122] *Id.* Pursuant to proposed Rule 14a–18(b), the nominating shareholder or group would be required to include in its notice to the company of the intent to nominate a representation that the nominating shareholder or group satisfies the conditions in Rule 14a–11(b).

[123] *See* 2003 Summary of Comments; comment letter on the Shareholder Proposals Proposing Release from California Public Employees' Retirement System (September 26, 2007) (''CalPERS 2007'') (noting that a 2003 analysis of the holdings of three of the largest public pension funds showed that their combined ownership exceeded 2% in only one instance, and exceeded 1.5% in only 12 instances).

[124] *See* 2003 Summary of Comments.

[125] *See id.*

[126] *See id.*

[127] *See id.*

[128] In this regard, we believe that the relative resource requirement for larger issuers to fund and administer the process would be smaller. Therefore, the thresholds we are proposing will more likely result in more large accelerated and accelerated filers receiving qualifying nominations than non-accelerated filers.

[129] The staff received beneficial ownership information for these companies aggregated at various thresholds and matched the information on market value of the float (obtained from Datastream). The sample excludes mutual funds.

[130] Institutional investment managers who exercise investment discretion over $100 million or more in Section 13(f) securities must report their holdings on Form 13F with the SEC. The sample includes 6,700 companies that are referenced in the Form 13F form that have common equity and are traded on NYSE, NYSE Amex Equities, or NASDAQ. Of these we were able to match the information on the market value of float (obtained from Datastream) for 5,877 observations.

[131] Under Rule 12b–2, a large accelerated filer must have an aggregate worldwide market value of

Continued

In the first sample, nearly all (above 99%) of large accelerated filers have at least one shareholder that could meet the 1% threshold individually, while a somewhat greater number of large accelerated filers (also above 99%) have two or more shareholders that each have held at least 0.5% of the shares outstanding for the appropriate period and, thus, could more easily aggregate their securities in order to meet the 1% ownership requirement. In the CDA sample, 98% of large accelerated filers have at least one shareholder that could meet the 1% threshold individually, while 99% of large accelerated filers have two or more shareholders that each have held at least 0.5% of the shares outstanding for the appropriate period. By contrast, based on the first sample, using an ownership threshold of 3% would reduce the number of large accelerated filers where a single shareholder could make a nomination to 77% of large accelerated filers and reduce the number of large accelerated filers that have two or more shareholders that have held at least 1.5% of the shares for the appropriate period to 89%. Using the CDA sample these numbers would drop to 96% and 97% respectively.

With regard to accelerated filers, roughly 85% of filers have at least one shareholder that could meet the 3% threshold individually, while roughly 92% of accelerated filers have two or more shareholders that each have held at least 1.5% of the shares outstanding for the appropriate period and, thus, could more easily aggregate their securities in order to meet the 3% ownership requirement. In the CDA sample, 91% of accelerated filers have at least one shareholder that could meet the 3% threshold individually, while 93% of accelerated filers have two or more shareholders that each have held at least 1.5% of the shares outstanding for the appropriate period. By contrast, based on the first sample, using an ownership threshold of 5% would reduce the number of accelerated filers where a single shareholder could make a nomination to 58% of accelerated filers. Further, 78% of accelerated filers have two or more shareholders that have held at least 2.5% of the shares for the appropriate period. Using the CDA sample these numbers would drop to 66% and 88% respectively.

With regard to non-accelerated filers, roughly 59% of filers in the first sample have at least one shareholder that could meet the 5% threshold individually, while roughly 71% of non-accelerated filers have two or more shareholders that each have held at least 2.5% of the shares outstanding for the appropriate period and, thus, could more easily aggregate their securities in order to meet the 5% ownership requirement. In the CDA sample, 41% of non-accelerated filers have at least one shareholder that could meet the 5% threshold individually, while 49% of non-accelerated filers have two or more shareholders that each have held at least 2.5% of the shares outstanding for the appropriate period. By contrast, based on the first sample, using an ownership threshold of 7% would reduce the number of non-accelerated filers where a single shareholder could make a nomination to 41% of non-accelerated filers. Further, only 43% of non-accelerated filers have two or more shareholders that have held at least 4% and 62% have two or more shareholders that have held at least 3% of the shares for the appropriate period.[132] Using the CDA sample these numbers would drop to 33%, 37% and 45% respectively.

With regard to registered investment companies, we are proposing tiered thresholds based on the net assets of the companies.[133] Consistent with our approach to reporting companies (other than registered investment companies), the tiered beneficial ownership thresholds that we are proposing represent an effort to balance the various competing views and address the possibility that certain registered investment companies could be impacted disproportionately based on their size. Because registered investment companies are not classified as large accelerated filers, accelerated filers, and non-accelerated filers, we propose to base the tiers on the net assets of the companies.[134] In particular, we are proposing tiers for registered investment companies that are based on the worldwide market value levels used by reporting companies (other than registered investment companies) to determine filing status.[135] Under the proposal, the amount of net assets of a registered investment company for these purposes would be the amount of net assets of the company as of the end of the company's second fiscal quarter in the fiscal year immediately preceding the fiscal year of the meeting, as disclosed in the company's Form N–CSR filed with the Commission, except that, for a series investment company the amount of net assets would be the company's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting, as disclosed in a Form 8–K filed in connection with the meeting where directors are to be elected.[136]

The requirement that the net asset determination for investment companies other than series investment companies be made as of the end of the company's second fiscal quarter in the fiscal year immediately preceding the fiscal year of the meeting is similar to the requirements for reporting companies (other than registered investment companies), which determine large accelerated filer, accelerated filer, and non-accelerated filer status as of the end of the fiscal year, using the market value of the issuer's common equity as of the last business day of the immediately preceding second fiscal quarter.[137] However, we have chosen a single date, June 30 of the calendar year immediately preceding the calendar year of the meeting, for series investment companies, due to the fact that different series of a series company may have different fiscal year and semi-annual period ending dates. Moreover, although registered investment companies generally are not required to file Form 8–K, we are proposing to require a registered investment company that is a series company to file Form 8–K within four business days after the company determines the anticipated meeting date, disclosing the company's net assets as of June 30 of the

the voting and non-voting common equity held by its non-affiliates of $700 million or more, and an accelerated filer must have an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of $75 million or more but less than $700 million. Filers that do not meet the criteria for accelerated or large accelerated filer status are classified as non-accelerated filers.

[132] The staff did not have information regarding the beneficial ownership for the 3.5% threshold.

[133] In the case of a registered investment company, in determining the securities that are entitled to be voted on the election of directors for purposes of establishing whether the applicable threshold has been met, the nominating shareholder or group may rely on information set forth in the following documents, unless the nominating shareholder or group knows or has reason to know that the information contained therein is inaccurate: (1) In the case of a series company, a Form 8–K that would be required to be filed in connection with the meeting where directors are to be elected (for a further discussion of Form 8–K filing requirements for registered investment companies, *see* footnote 138, below, and accompanying text); or (2) in the case of other registered investment companies, the company's most recent annual or semi-annual report filed with the Commission on Form N–CSR. *See* Instruction 1 to proposed Rule 14a–11(b).

[134] *See* Instruction 2 to proposed Rule 14a–11(b). For registered investment companies that are organized in series form, we are proposing that the net assets thresholds apply to the company as a whole, and not on a series by series basis, because directors are elected for the company by the shareholders of all series rather than separately for each series of the company. *See* Investment Company Act Rule 18f–2(g) [17 CFR 270.18f–2(g)].

[135] *See* footnote 131, above.

[136] *See* Instructions 2 and 3 to proposed Rule 14a–11(b).

[137] *See* Rule 12b–2.

calendar year immediately preceding the calendar year of the meeting and the total number of the company's shares that are entitled to vote for the election of directors (or if votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) as of the end of the most recent calendar quarter.[138] Registered investment companies, including series investment companies, currently disclose net asset and outstanding share information in their annual and semi-annual reports filed on Form N–CSR, but we believe that the additional Form 8–K filing is necessary for series companies because a series company may file multiple Form N–CSRs with respect to different series covering different fiscal year and semi-annual period ending dates and is required to disclose net asset and outstanding share information on a series by series basis, rather than for the company as a whole.

The purpose of the proposed rule would be to remove impediments the federal proxy rules create to shareholders' exercise of their rights to nominate and elect members of boards of directors. At the same time, we recognize that there are competing concerns that also need to be taken into account, such as the potential cost and disruption to the company of a rule with no shareholder eligibility requirements. To balance those interests, we are proposing a rule that includes shareholder eligibility requirements. In particular, we are proposing eligibility requirements based on the duration of ownership and minimum ownership levels.

With respect to duration of ownership eligibility criteria, we believe that long-term shareholders are more likely to have interests that are better aligned with other shareholders and are less likely to use the rule solely for short-term gain. We are proposing a one year holding requirement for each nominating shareholder or member of a nominating group rather than the two year requirement proposed in 2003. The holding period generated less comment in 2003 than the ownership threshold, with the majority of commenters that addressed the topic supporting the proposed holding period.[139] Some commenters, however, advocated either lowering the holding period to one year,[140] or raising it (*e.g.,* to 5 years).[141] Some of these commenters suggested that the two year holding period was too onerous.[142] After further consideration, we believe that a one year holding requirement would be sufficient to appropriately limit use of Rule 14a–11 to long-term shareholders without placing an undue burden on shareholders seeking to use the rule. In addition, a one year requirement is consistent with the existing eligibility requirement for shareholders to submit proposals under Rule 14a–8.

With regard to a minimum ownership level as a shareholder eligibility requirement, we believe it is important that any shareholder or group that intends to submit a nominee to a company for inclusion in the company's proxy materials continue to have a significant economic interest in the company. Therefore, we have proposed the requirement that a nominating shareholder or group provide a statement as to the nominating shareholder's or group's intent to continue to hold the requisite amount of securities through the date of the meeting. Commenters in 2003 generally supported a holding requirement through the date of the meeting,[143] with some suggesting an even longer holding period (*e.g.,* through the term of the nominee's service on the board, if elected).[144] We continue to believe that a requirement to hold the securities through the date of the meeting is appropriate to demonstrate the nominating shareholder's commitment to the director nominee and the election process; however, we also have proposed a disclosure requirement under which a nominating shareholder or group would state their intent with respect to continued ownership of their shares after the election.[145]

In addition, to rely on proposed Rule 14a–11 to have disclosure about their nominee or nominees included in the company proxy materials, a nominating shareholder or group must:

- Not acquire or hold the securities for the purpose of or with the effect of changing control of the company or to gain more than a limited number of seats on the board;
- Provide and file with the Commission a notice to the company on proposed new Schedule 14N [146] of the nominating shareholder's or group's intent to require that the company include that nominating shareholder's or group's nominee in the company's proxy materials by the date specified by the company's advance notice provision or, where no such provision is in place, no later than 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting,[147] except that if the company did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 days from the prior year, then the nominating shareholder or group must provide notice a reasonable time before the company mails its proxy materials, as specified by the company in a Form 8–K filed within four business days after the company determines the anticipated meeting date pursuant to proposed Item 5.07; [148] and

[138] *See* proposed General Instruction B.1 and proposed Item 5.07(b) of Form 8–K; proposed Rules 13a–11(b)(3) and 15d–11(b)(3); and Instruction 3 to proposed Rule 14a–11(b).

[139] *See* 2003 Summary of Comments; *see also* comment letters from AFL–CIO; Alliance Capital Management L.P. (December 15, 2003) (''Alliance Capital''); American Society of Corporate Secretaries (December 22, 2003) (''ASCS''); Henry A. McKinnell, Chairman, The Business Roundtable (December 22, 2003) (''McKinnell, BRT''); United States Chamber of Commerce (December 19, 2003) (''Chamber''); Carl T. Hagberg (December 22, 2003); Committee on Securities Regulation, New York State Bar Association (December 22, 2003) (''NYS Bar''); State Teachers Retirement System of Ohio (December 18, 2003) (''STRS Ohio''); Sullivan & Cromwell LLP (December 22, 2003) (''Sullivan''); T. Rowe Price Associates, Inc. (December 24, 2003) (''T. Rowe''); Valero; and Wachtell.

[140] *See* 2003 Summary of Comments; *see also* comment letters from CalPERS; CIR; Gary K. Duberstein (December 22, 2003) (''Duberstein''); Gary Tannahill (December 6, 2003) (''Tannahill''); and Wolf Haldenstein Adler Freeman & Herz LLP (December 19, 2003) (''Wolf Haldenstein'').

[141] *See* 2003 Summary of Comments; *see also* letters from Compass Bancshares, Inc. (December 22, 2003) (''Compass''); and W. Paul Fitzgerald, Director, EMC Corporation (December 19, 2003), Gail Deegan, Director, EMC Corporation (December 22, 2003), and Alfred Zeien, Director, EMC Corporation (December 22, 2003) (collectively, ''EMC Corporation'').

[142] *See* 2003 Summary of Comments; *see also* comment letters from CalPERS; CIR; Duberstein; Tannahill; and Wolf Haldenstein.

[143] *See* 2003 Summary of Comments; *see also* comment letters from America's Community Bankers (December 18, 2003) (''ACB''); Alliance Capital; ASCS; Blackwell Sanders Peper Martin LLP (December 22, 2003) (''Blackwell Sanders''); McKinnell, BRT; CalPERS; Chamber; CIR; Compass; FedEx Corporation (December 19, 2003) (''FedEx''); Intel Corporation (December 22, 2003) (''Intel''); International Paper Company (December 22, 2003) (''International Paper''); Peter O. Clauss and J. Peter Wolf of Pepper Hamilton, LLP (December 16, 2003) (''Clauss & Wolf''); Sullivan; Tannahill; Valero; Wachtell; and Wells Fargo & Company (December 19, 2003) (''Wells Fargo'').

[144] *See* 2003 Summary of Comments; *see also* comment letters from ACB; McKinnell, BRT; Chamber; Compass; FedEx; Intel; International Paper; Clauss & Wolf; Sullivan; Valero; Wachtell; and Wells Fargo.

[145] *See* proposed Rule 14a–18(f) and proposed Item 5(b) of Schedule 14N.

[146] *See* Section III.B.6. for a discussion of Schedule 14N and the disclosure required to be filed.

[147] This date would be calculated by determining the release date disclosed in the previous year's proxy statement, increasing the year by one, and counting back 120 calendar days.

[148] *See* proposed Instruction 2 to paragraph (a) of Rule 14a–11 and proposed General Instruction B.1.

Continued

• Include in the shareholder notice on Schedule 14N disclosure about the amount and percentage of securities owned by the nominating shareholder or group, length of ownership of such securities, and the nominating shareholder's or group's intent to continue to hold the securities through the date of the meeting as well as intent with respect to continued ownership after the election, a certification that the nominating shareholder or group is not seeking to change the control of the company or to gain more than a limited number of seats on the board of directors, and disclosure meeting the requirements of Rule 14a–18.[149]

Request for Comment

C.1. Are the proposed shareholder eligibility criteria for Rule 14a–11 necessary or appropriate? If not, why not? Should there be any restrictions regarding which shareholders can use proposed Rule 14a–11 to nominate directors for inclusion in company proxy materials? Should those restrictions be consistent with the requirements of Rule 14a–8 or should they be more extensive than the minimum requirements in Rule 14a–8?

C.2. The proposed eligibility threshold is based on the percentage of securities owned and entitled to vote on the election of directors. This threshold is based on current Rule 14a–8 and reflects our intent to focus on those shareholders eligible to vote for directors. Is the proposed threshold appropriate or could it be better focused to accomplish our objective? For example, should eligibility instead be based on record ownership? Should eligibility be based on the value of shares owned? If so, on what date should the value be measured? What would be an appropriate value amount? Is there another standard or criteria? Is submission of the nomination the correct date on which to make these eligibility determinations? If not, what date should be used?

C.3. For companies that have more than one class of securities entitled to vote on the election of directors, does the rule provide adequate guidance on how to determine whether a shareholder meets the requisite ownership thresholds? Should the rule specifically address how to make this determination if one class of securities has greater voting rights than another class?

C.4. What other criteria or alternatives should the Commission consider to determine the eligibility standards for shareholders to nominate directors?

C.5. Is it appropriate to use a tiered approach to the ownership threshold for reporting companies (other than registered investment companies)? If so, is it appropriate and workable to use large accelerated filer, accelerated filer, and non-accelerated filer to define the three tiers? Are there aspects of the definitions of these groups that do not work with the proposed rule? Should we instead define the tiers strictly by public float or strictly by market capitalization? If so, what should the public float or market capitalization thresholds be (*e.g.*, 5% for companies with less than $75,000,000 in public float; 3% for companies with more than $75,000,000 but less than $700,000,000 in public float; 1% for companies with greater than $700,000,000 in public float)?

C.6. Is the 1% standard that we have proposed for large accelerated filers appropriate? Should the standard be lower (*e.g.*, $2,000 or 0.5%) or higher (*e.g.*, 2%, 3%, 4%, 5%, 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)? Is the 3% standard that we have proposed for accelerated filers appropriate? Should the standard be lower (*e.g.*, 1% or 2%) or higher (*e.g.*, 4%, 5%, 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)? Is the 5% standard that we have proposed for non-accelerated filers appropriate? Should the standard be lower (*e.g.*, 1%, 2%, 3%, or 4%) or higher (*e.g.*, 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)?

C.7. Should groups of shareholders composed of a large number of beneficial holders, but who collectively own a percentage of shares below the proposed thresholds, be permitted to have a nominee included in the company proxy materials? If so, what would be a sufficiently large group? Would a group composed of over 1%, 3%, 5% or 10% of the number of beneficial holders be sufficient? Should there be different disclosure requirements for a large shareholder group?

C.8. Is it appropriate to use a tiered approach to the ownership threshold for registered investment companies? Should the tiers and ownership percentages for registered investment companies be similar to those for reporting companies other than registered investment companies, as proposed, or should they be different? Is it appropriate and workable to base the tiers on a registered investment company's net assets? Should another measure be used instead? Should the determination of which tier a series investment company belongs to be made on a series by series basis, rather than for the company as a whole? Should the levels of net assets for each category be higher or lower? If so, why?

C.9. Should the determination of which tier a series investment company is in be based on the company's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting, as disclosed in a Form 8–K filed in connection with the meeting at which directors are to be elected? Should the determination of which tier other registered investment companies are in be based on the net assets of the company as of the end of the company's second fiscal quarter in the fiscal year immediately preceding the fiscal year of the meeting, as disclosed in the company's Form N–CSR? If not, as of what date should net assets be determined for these purposes? Should all registered investment companies use a single date for purposes of making this determination?

C.10. Should a registered investment company that is a series company be required to file a Form 8–K disclosing the company's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting and the total number of shares of the company that are entitled to vote for the election of directors (or if votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) as of the end of the most recent calendar quarter? If not, how should shareholders of a series company determine whether they meet the applicable ownership threshold?

C.11. Is the 1% standard that we have proposed for registered investment companies with net assets of $700 million or more appropriate? Should the standard be lower (*e.g.*, $2,000 or 0.5%) or higher (*e.g.*, 2%, 3%, 4%, 5%, 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)? Is the 3% standard that we have proposed for registered investment companies with net assets of $75 million or more, but less than $700 million, appropriate? Should the standard be lower (*e.g.*, 1% or 2%) or higher (*e.g.*, 4%, 5%, 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)? Is the 5% standard that we have proposed for registered investment companies with net assets of less than $75 million appropriate? Should the standard be lower (*e.g.*, 1%, 2%, 3%, or 4%) or higher (*e.g.*, 6%, 7%, 8%, 9%, 10%,

to Form 8–K. A late filing of such form would result in the registrant losing eligibility to file on Form S–3.

[149] *See* proposed Exchange Act Rules 14a–18 and 14n–1. *See* discussion in Section III.B.5. regarding proposed Rule 14a–11(d), which limits the number of nominees a company would be required to include in its proxy materials.

15%, 20%, or 25%)? Should the determination of whether a shareholder or shareholder group beneficially owns a sufficient percentage of a series company's securities to nominate a director be made on a series by series basis, rather than for the company as a whole (*i.e.*, should a shareholder be permitted to take advantage of the nomination process contained in proposed Rule 14a–11 if he or she owns the applicable percentage of shares of a series of the company, but does not own the applicable percentage of the company as a whole)? Should closed-end investment companies be subject to the same standards as open-end investment companies? As proposed, business development companies would be treated in the same manner as reporting companies (other than registered investment companies).[150] Should business development companies be subject to the same tiered approach as reporting companies (other than registered investment companies)? Why or why not?

C.12. In determining the securities that are entitled to be voted on the election of directors of a registered investment company for purposes of establishing whether the applicable threshold has been met, should the nominating shareholder or group be permitted to rely on information set forth in a Form 8–K filed in connection with the meeting where directors are to be elected (in the case of a series company) or the company's most recent annual or semi-annual report filed with the Commission on Form N–CSR (in the case of other investment companies), unless the nominating shareholder or group knows or has reason to know that the information contained therein is inaccurate?

C.13. Voting rights for some registered investment companies are based on the net asset value of the shareholder's securities rather than the number of securities. Does the rule provide adequate guidance on how to determine whether a shareholder meets the requisite ownership threshold in such a case? Should the rule specifically address how to make the ownership threshold determination in cases where different securities of the same investment company have different voting rights on a per share basis?

C.14. Should there be a restriction on shareholder eligibility that is based on the length of time securities have been held? If so, is one year the proper standard? Should the standard be longer (*e.g.*, two years, three years, four years, or five years)? Should the standard be shorter (*e.g.*, six months)? Should the standard be measured by a different date (*e.g.*, one year as of the date of the meeting, rather than the date of the notice)?

C.15. Should eligibility be conditioned on meeting the required ownership threshold by holding a net long position for the required time period? If the Commission were to adopt such a requirement, would this require other modifications to the proposal?

C.16. As proposed, a nominating shareholder would be required to represent its intent to hold the securities until the date of the election of directors. Is it appropriate to include such a requirement? What should be the remedy if the nominating shareholder or group represents its intent to hold the securities through the date of the meeting for the election of directors and fails to do so? Should the company be permitted to exclude any nominations from that nominating shareholder or member of a group for some period of time afterward (*e.g.*, one year, two years, three years)? If the nominating shareholder or group fails to hold the securities through the date of the meeting, what, if anything, should the effect be on the election? Should the nominee submitted by the shareholder or group be disqualified?

C.17. We are proposing that a nominating shareholder represent an intent to hold through the date of the meeting because we believe it is important that the nominating shareholder or group have a significant economic interest in the company. Is it appropriate to require the shareholder to provide a statement regarding its intent with regard to continued ownership of the securities beyond the election of directors? Should a nominating shareholder be required to represent that it will hold the securities beyond the election if the nominating shareholder's nominee is elected (*e.g.*, for six months after the election, one year after the election, or two years after the election)? Would the answer be different if the nominating shareholder's nominee is not elected?

C.18. In the 2003 Proposal the Commission solicited comment on whether the rule should include a provision that would deny eligibility for any nominating shareholder or group that has had a nominee included in the company materials where that nominee did not receive a sufficient percentage of the votes. Commenters were mixed in their responses [151] so we have not proposed a requirement in this regard, but are again requesting comment as to whether the rule should include a provision denying eligibility for any nominating shareholder or group who has had a nominee included in the company materials where that nominee did not receive a sufficient percentage of the votes (*e.g.*, 5%, 10%, 15%, 25%, or 35%) within a specified period of time in the past (*e.g.*, one year, two years, three years, four years, five years). If there should be such an eligibility standard, how long should the prohibition last (*e.g.*, one year, two years, three years)? Similarly, we are again requesting comment (see also Request for Comment D.16.) as to whether the rule should include a provision that would deny eligibility for any nominee that has been included in the company proxy materials within a specified period of time in the past (*e.g.*, one year, two years, three year, four years, five years) where that nominee did not receive at least a specified percentage of the votes (*e.g.*, 5%, 10%, 15%, 25%, or 35%). How long should any such prohibition last (*e.g.*, one year, two years, three years)?

C.19. As proposed, shareholders may aggregate their holdings in order to meet the ownership eligibility requirement. The shares held by each member of a group that are used to satisfy the ownership threshold must meet the minimum holding period. Should shareholders be allowed to aggregate their holdings in order to meet the ownership eligibility requirement to nominate directors?

C.20. If shareholders should be able to aggregate their holdings, is it appropriate to require that all members of a nominating shareholder group whose shares are used to satisfy the ownership threshold to meet the minimum holding period individually? If aggregation is not appropriate, what ownership threshold would be appropriate for an individual shareholder?

C.21. If a nominating shareholder sells any shares of the company that are in excess of the amount needed to satisfy the ownership threshold, should that shareholder not be eligible under the rule? Would it matter when the nominating shareholder sold the shares in relation to the nomination process?

[150] Business development companies are a category of closed-end investment companies that are not registered under the Investment Company Act, but are subject to certain provisions of that Act. *See* Sections 2(a)(48) and 54–65 of the Investment Company Act [15 U.S.C. 80a–2(a)(48) and 80a–53–64].

[151] *See* 2003 Summary of Comments; *see also* comment letters from CalPERS, CII, and CIR (objecting to resubmission standards); and comment letters from ASCS, Blackwell Sanders, Investment Company Institute (December 22, 2003) (''ICI''), The New York City Bar Association (December 22, 2003) (''NYC Bar''), and Wells Fargo (expressing support for a resubmission standard).

C.22. Would shareholder groups effectively be able to form to satisfy the ownership thresholds? If not, what impediments exist? What, if anything, would be appropriate to lessen or eliminate such impediments?

C.23. What would be an appropriate method of establishing the beneficial ownership level of a nominating shareholder or group? What would be sufficient evidence of ownership? For example, if the nominating shareholder is not the registered holder of the securities, should the nominating shareholder be required to provide a written statement from the ''record'' holder of the securities (usually a broker or bank), verifying that at the time the nominating shareholder submitted its notice to the company, the nominating shareholder continuously held the securities for at least one year?

C.24. Should the Commission limit use of the rule, as proposed, to shareholders that are not seeking to change the control of the company or to gain more than a limited number of seats on the board of directors? Why or why not? Would it be appropriate to require the shareholder to represent that it will not seek to change the control of a company or to gain more than a limited number of seats on the board for a period of time beyond the election of directors? How should the rules address the possibility that a nominating shareholder's or group's intent may change over time?

4. Shareholder Nominee Requirements

a. The Nomination Must Be Consistent With Applicable Law and Regulation

A company would not be required to include a shareholder nominee in its proxy materials if the nominee's candidacy or, if elected, board membership would violate controlling state law,[152] federal law,[153] or rules of a national securities exchange or national securities association (other than rules of a national securities exchange or national securities association that set forth requirements regarding the independence of directors), and such violation could not be cured.[154] Because compliance with independence standards can depend on the overall make-up of a board, we have excluded independence standards from this requirement and have, instead, proposed a separate provision addressing independence standards. The nominating shareholder or group would be required to make a representation that the shareholder nominee is in compliance with the generally applicable independence requirements of a national securities exchange or national securities association that sets forth objective standards.[155] The representation would not be required in instances where a company is not subject to the requirements of a national securities exchange or a national securities association. We recognize that exchange rules regarding director independence generally include some standards that depend on an objective determination of facts and other standards that depend on subjective determinations.[156] As proposed, however, to comply with Rule 14a–11 the nominating shareholder or group would only be required to represent that the nominee meets the objective criteria for ''independence'' in any generally applicable national securities exchange or national securities association rules.[157] For this purpose, the nominee would be required to meet the definition of ''independent'' that is applicable to directors of the company generally and not any particular definition of independence applicable to members of the audit committee of the company's board of directors. To the extent a rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board (for example, requiring that the board of directors or any group or committee of the board of directors make a determination that the nominee has no material relationship with the listed company), this element of an independence standard would not have to be satisfied.

Specifically, as proposed, each nominating shareholder or each member of the nominating shareholder group would be required to represent in its notice to the company on Schedule 14N [158] that, to the knowledge of the nominating shareholder or group, the nominee, in the case of a registrant other than an investment company, satisfies the standards of a national securities exchange or national securities association regarding director independence that apply to the company, if any, except that, where a rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board, this element of an independence standard would not have to be satisfied.[159] Where a

[152] Rule 14a–11, as proposed, would permit a company to exclude a shareholder nominee from its proxy materials if the nominee's candidacy or, if elected, board membership would violate controlling state or federal law. If a company's governing documents permit the inclusion of shareholder nominees in the company's proxy materials but impose more restrictive eligibility standards or mandate more extensive disclosures than those required by Rule 14a–11, the company could not exclude a nominee submitted by a shareholder in compliance with Rule 14a–11 on the grounds that the shareholder or the nominee fails to meet the more restrictive standards included in the company's governing documents. In other words, companies may not opt out of Rule 14a–11 by adopting alternate requirements for inclusion of shareholder nominees for director in the company's proxy materials.

[153] For example, in response to our 2003 Proposal, one commenter noted that without such a requirement, a shareholder could nominate and have elected a director who was employed by a company's competitor thereby ''potentially causing the company to violate Section 8 of the Clayton Act of 1914.'' *See* 2003 Summary of Comments; *see also* comment letter from McKinnell, BRT.

[154] This requirement is set forth in proposed Exchange Act Rule 14a–11(a)(2). Pursuant to proposed Exchange Act Rule 14a–18(a), the notice to the company by the nominating shareholder or group would be required to include a representation that, to the knowledge of the nominating shareholder or group, the nominee's candidacy or, if elected, board membership would not violate any of the specified provisions.

[155] Compliance with these existing independence standards would be established through the inclusion in the notice to the company by the nominating shareholder or group of a representation that the nominee satisfies the existing standard. This representation is required in proposed Exchange Act Rule 14a–18(c). In the case of a registered investment company or a business development company, a nominating shareholder or group would be required to represent that its nominee is not an ''interested person'' of the company as defined in Section 2(a)(19) of the Investment Company Act. [15 U.S.C. 80a–2(a)(19)].

[156] *See* proposed Rule 14a–18(c) and the Instruction to paragraph (c). For example, the NYSE listing standards include both subjective and objective components in defining an ''independent director.'' As an example of a subjective determination, Section 303A.02(a) of the NYSE Listed Company Manual provides that no director will qualify as ''independent'' unless the board of directors ''affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company).'' Section 303A.02(b) of the NYSE Listed Company Manual provides that a director is not independent if the director has any of several specified relationships with the company. On the other hand, Section 303A.02(b) provides that a director is not independent if he or she has any of several specified relationships with the company that can be determined by a ''bright-line'' objective test. For example, a director is not independent if ''the director has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than $120,000 in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service).''

[157] *See* Instruction to proposed Rule 14a–18(c).

[158] *See* proposed Rule 14n–101.

[159] *See* proposed Rule 14a–18(a). We note that our proposal addresses only the requirements under Rule 14a-11 to be included in a company's proxy materials—the proposal would not preclude a nominee from ultimately being subject to the subjective determination test of independence for board committee positions. A company could include disclosure in its proxy materials advising shareholders that the shareholder nominee for director would not meet the company's subjective criteria, as appropriate.

company is not subject to the standards of a national securities exchange or national securities association, the representation would not be required.

The proposals would require any nominating shareholder or group of shareholders of a registered investment company or a business development company to represent that its nominee to the board of the company is not an ''interested person'' of the company as defined in Section 2(a)(19) of the Investment Company Act,[160] rather than representing that the nominee satisfies the generally applicable objective standards of a national securities exchange or national securities association regarding director independence.[161] We are proposing to incorporate the Section 2(a)(19) test rather than the test applied to other companies because the Section 2(a)(19) test is tailored to capture the broad range of affiliations with investment advisers, principal underwriters, and others that are relevant to ''independence'' in the case of investment companies.

Some commenters on the 2003 Proposal stated that nominating committees should be able to apply their own director qualifications criteria to shareholder nominees; [162] however, a nominee required to be included by the company pursuant to Exchange Act Rule 14a–11 would be, notwithstanding the conditions in the proposal, the nominating shareholder's or group's nominee, not the company's nominee. Therefore, we do not believe it is appropriate that shareholder nominees be required to meet the nominating committee's or board's criteria.

b. Relationships Between the Nominee, the Nominating Shareholder or Group, and the Company

We recognize that a shareholder nomination process presents the potential risk of nominating shareholders or groups acting merely as a surrogate for the company or its management in order to block usage of the rule by another nominating shareholder or group. To balance the benefits of the new rule against these concerns, we propose that the nominating shareholder or group be required to represent that no relationships or agreements between the nominee and the company and its management, and between the nominating shareholder or group and the company and its management exist.[163] Specifically, as proposed, each nominating shareholder or each member of the nominating shareholder group would be required to represent in its notice to the company on Schedule 14N that neither the nominee nor the nominating shareholder (or any member of the nominating shareholder group, if applicable) has an agreement with the company regarding the nomination of the nominee.[164] This representation, along with the required disclosure, would provide some assurance to shareholders that certain shareholders or groups are not receiving special treatment by the company or acting on the company's behalf.[165] This proposed requirement also was included in the 2003 proposal. Commenters generally supported the proposed requirement,[166] though some suggested that the Commission provide an exception for negotiations and other communications between the nominating shareholder or group and the company regarding potential nominees.[167] Accordingly, we have proposed a clarifying instruction to proposed Rule 14a–18(d), which states that negotiations with the nominating committee of the company to have the nominee included on the company's proxy card as a management nominee, where those negotiations are unsuccessful, or negotiations that are limited to whether the company is required to include the shareholder nominee for director on the company's proxy card in accordance with Rule 14a–11, would not be considered a direct or indirect agreement with the company for purposes of the rule.[168]

The Commission also recognizes that some commenters feel that inclusion of shareholder nominees for director in company proxy materials could have a disruptive effect on board dynamics and board operation.[169] For example, we have heard from some commenters concerns about the possibility of ''special interest'' or ''single issue'' directors that would advance the interests of the nominating shareholder over the interests of shareholders as a group.[170] In response to this concern, in 2003, the Commission proposed a limitation on relationships between a nominating shareholder or group and the director nominee that is included in company proxy materials. For example, where the nominating shareholder or members of the nominating shareholder group were natural persons, the nominating shareholder or group would not have been able to nominate themselves or any member of the nominating shareholder group, or any member of the immediate family of the nominating shareholder or any member of the group. In addition, a nominating shareholder would not have been able to nominate an individual who had been employed by, or whose immediate family member had been employed by, the nominating shareholder or any member of the nominating shareholder group, or who had accepted consulting, advisory, or other compensatory fees from the nominating shareholder or any member of the nominating shareholder group. A number of commenters expressed concern about these requirements,[171] and questioned the

[160] 15 U.S.C. 80a–2(a)(19).

[161] *See* proposed Rule 14a–18(c).

[162] *See* 2003 Summary of Comments; *see also* comment letters from ABA; Agilent Technologies, Inc. (December 19, 2003) (''Agilent''); McKinnell, BRT; Chamber; Richard Hall (December 22, 2003) (''Hall''); ICI; Intel; NYC Bar; Software & Information Industry Association (December 22, 2003) (''SIIA''); Sullivan; Valero; and Wells Fargo.

[163] This representation would be required in the nominating shareholder's notice to the company on Schedule 14N, pursuant to proposed Exchange Act Rule 14a–18(d). Instruction 2 to proposed Exchange Act Rule 14a–11(d) clarifies that if a nominee, nominating shareholder or any member of a nominating group has an agreement with the company or an affiliate of the company regarding the nomination of a candidate for election, any nominee or nominees from such shareholder or group shall not be counted in calculating the number of shareholder nominees for purposes of proposed Rule 14a–11(d).

[164] *See* proposed Rule 14a–18(d).

[165] The nominating shareholder and each member of the nominating shareholder group would be subject to liability pursuant to a proposed amendment to Rule 14a–9 with respect to the representation and disclosure included in the company's proxy materials.

[166] *See* 2003 Summary of Comments; *see also* comment letters from McKinnell, BRT; CalPERS; CII; CIR; and Wells Fargo.

[167] *See* 2003 Summary of Comments; *see also* comment letters from McKinnell, BRT and Wells Fargo.

[168] *See* proposed Instruction 1 to Rule 14a–18(d).

[169] *See, e.g.,* comment letter on 2007 Proposals from Mulcahy, BRT.

[170] *See* comment letters on 2007 Proposals from Keith F. Higgins, Committee Chair, American Bar Association, Section of Business Law (October 2, 2007) (''ABA 2007''); and Mulcahy, BRT. *See also* 2003 Summary of Comments and comment letters from ABA; ASCS; McKinnell, BRT; Blackwell Sanders; Sullivan; and Valero.

[171] *See* 2003 Summary of Comments; *see also* comment letters from BellTel Retirees Inc. (January 12, 2004); AFL–CIO; Association for Investment Management and Research (December 22, 2003); Association of US West Retirees (January 13, 2004); CalPERS; CalSTRS; CII; CIR; Corporate Library; Domini Social Investments LLC (December 22, 2003); Duberstein; State Board of Administration of Florida (December 19, 2003); Mark S. Gardiner (December 22, 2003); Hermes Pensions Management Limited (December 22, 2003); Alan G. Hevesi, Comptroller, State of New York (December 19, 2003) (''Hevesi''); Institutional Shareholder Services (December 18, 2003); Lawndale Capital Management, LLC (December 22, 2003) (''Lawndale''); LongView; LSV Asset Management (December 22, 2003); James McRitchie, Editor, Corporate Governance (November 16, 2003, December 22, 2003, and March 29, 2004) (''McRitchie 2003''); State Retirement and Pension System of Maryland (December 16, 2003); STRS Ohio; Ohio Public Employees Retirement System (December 22, 2003); Relational Investors LLC

Continued

fairness and wisdom of the limitations.[172] These commenters did not believe that it was fair to subject shareholder nominees for director to a different standard than board nominees [173] and felt that the requirements would inhibit significant holders from seeking seats on boards,[174] thus excluding particularly desirable director candidates from being nominated under the rule.[175] While some commenters supported the proposed limitations (*e.g.,* to address the special interest concern),[176] others noted that any nominees that were included in the company's proxy materials would still have to be elected by the shareholders and, if elected, would be subject to State law fiduciary duties.[177]

After further consideration and review of the comments on the 2003 Proposal, we have determined not to propose limitations on the relationships between a nominating shareholder or group and their director nominee or nominees. We agree with those commenters that opposed the proposed limitations and believe that such limitations may not be appropriate or necessary. Rather, we believe that Rule 14a–11, as proposed, should facilitate exercises of state law rights and afford a shareholder or group meeting the proposed standards the ability to propose a nominee for director that, in the nominating shareholder's view, better represents the interests of shareholders than those put forward by the nominating committee or board. We note that once a nominee is elected to the board of directors, that director will be subject to state law fiduciary duties and owe the same duty to the corporation as any other director on the board.

c. Nominating Shareholder or Group Will Not Be Deemed Affiliates of the Company

It is our view that the mere use of proposed Rule 14a–11, by itself, should not be deemed to establish a relationship between the nominating shareholder or group and the company that would result in that holder or group being deemed an ''affiliate'' of the company for purposes of the federal securities laws. Accordingly, proposed Rule 14a–11(a) would include an instruction making clear that a nominating shareholder will not be deemed an ''affiliate'' of the company under the Securities Act of 1933 [178] or the Exchange Act solely as a result of nominating a director or soliciting for the election of such a director nominee or against a company nominee pursuant to Rule 14a–11.[179] In addition, where a shareholder nominee is elected, and the nominating shareholder or group does not have an agreement or relationship with that director, other than relating to the nomination, the nominating shareholder or group would not be deemed an affiliate solely by virtue of having nominated that director under the proposed rules.[180]

Request for Comment

D.1. Is it appropriate to use compliance with state law, federal law, and listing standards as a condition for eligibility?

D.2. Should there be any other or additional limitations regarding nominee eligibility? Would any such limitations undercut the stated purposes of the proposed rule? Are any such limitations necessary? If so, why?

D.3. Should there be requirements regarding independence of the nominee and nominating shareholder or group and the company and its management? If so, are the proposed limitations appropriate? What other or additional limitations would be appropriate? If these limitations generally are appropriate, are there instances where they should not apply? Should the fact that the nominee is being nominated by a shareholder or group, combined with the absence of any agreement with the company or its management, be a sufficient independence requirement?

D.4. How should any independence standards be applied? Should the nominee and the nominating shareholder or group have the full burden of determining the effect of the nominee's election on the company's compliance with any independence requirements, even though those consequences may depend on the outcome of any election and may relate to the outcome of the election with regard to nominees other than shareholder nominees? Should the rules specify that the nominating shareholder or group may rely on information disclosed in the company's Commission filings in making this determination? How should the independence standards be applied when the entity is not a corporation—for example, a limited partnership?

D.5. Where a company is subject to an independence standard of a national securities exchange or national securities association that includes a subjective component (*e.g.,* subjective determinations by a board of directors or a group or committee of the board of directors), should the shareholder nominee be subject to those same requirements as a condition to nomination?

D.6. As proposed, a nominating shareholder or group would be required to represent that the shareholder nominee satisfies generally applicable objective standards of a national securities exchange or national securities association that are applicable to directors of the company generally and not any particular definition of independence applicable to members of the audit committee of the company's board of directors. Should the proposal clarify that the nominee must meet the applicable objective standards of the company's primary listing exchange?

D.7. Should the company or its nominating committee have any role in determining whether a shareholder nominee satisfies the generally applicable objective standards for director independence of any exchange on which the company's securities are listed?

D.8. If a company has more stringent independence requirements than the listing standards applicable to the company, should the company's requirements apply? Or should the listing standards apply?

D.9. If a company is not subject to an independence standard, should shareholder nominees to the board of directors under Rule 14a–11 be required to provide disclosure concerning whether they would be independent? If so, what standard should apply? Should

(December 21, 2003) (''Relational''); Kurt Schacht, J.D., CFA, Wyser-Pratte & Co. (November 13, 2003); San Diego City Employees' Retirement System (December 17, 2003); Social Investment Forum Ltd. (December 22, 2003); and Tannahill.

[172] *See* 2003 Summary of Comments; *see also* comment letters from CalPERS; CII; Hevesi; Lawndale; and Relational.

[173] *See id.*

[174] *See* 2003 Summary of Comments; *see also* comment letters from CalPERS; CII; Lawndale; McRitchie 2003; and Relational.

[175] *See* 2003 Summary of Comments; *see also* comment letter from Richard Moore, North Carolina Treasurer; Sean Harrigan, President, CalPERS; and Alan G. Hevesi, New York State Comptroller, on behalf of National Coalition for Corporate Reform (December 18, 2003) (''NCCR'').

[176] *See* 2003 Summary of Comments; *see also* comment letters from ABA; ASCS; Blackwell Sanders; Hall; and Sullivan.

[177] *See* 2003 Summary of Comments; *see also* comment letters from CalPERS and NCCR.

[178] 15 U.S.C. 77a *et seq.*

[179] This safe harbor is set forth in Instruction 1 to proposed Rule 14a–11(a). The safe harbor is intended to operate such that the determination of whether a shareholder or group is an ''affiliate'' of the company would continue to be made based upon all of the facts and circumstances regarding the relationship of the shareholder or group to the company, but a shareholder or group will not be deemed an affiliate ''solely'' by virtue of having nominated that director.

[180] *See* Instruction 1 to proposed Rule 14a–11(a).

the nominating shareholder or group be able to select the standard?

D.10. Should we apply the ''interested person'' standard of Section 2(a)(19) of the Investment Company Act with respect to the representation that a shareholder nominee be independent from a company that is a registered investment company? Should the ''interested person'' standard also apply to shareholder nominees for election to the board of directors of a business development company? Should we instead apply a different independence standard to registered investment companies or business development companies, such as the definition of independence in Exchange Act Rule 10A–3? [181]

D.11. As proposed, the rule includes a safe harbor providing that nominating shareholders will not be deemed ''affiliates'' solely as a result of using Rule 14a–11. This safe harbor would apply not only to the nomination of a candidate, but also where that candidate is elected, provided that the nominating shareholder or group does not have an agreement or relationship with that director otherwise than relating to the nomination. Is it appropriate to provide such a safe harbor for shareholder nominations? Should the safe harbor continue to apply where the nominee is elected? If so, should the nomination and election of the shareholder's nominee be a consideration in determining whether the shareholder is an affiliate, or should the safe harbor be ''absolute''?

D.12. Should the Commission include a similar safe harbor provision for nominating shareholders that submit a nominee for inclusion in a company's proxy materials pursuant to an applicable state law provision or a company's governing documents rather than using proposed Rule 14a–11? Why or why not?

D.13. Should the eligibility criteria include a prohibition on any affiliation between nominees and nominating shareholders or groups? If so, what limitations would be appropriate? For example, should there be a prohibition on the nominee being the nominating shareholder or a member of the nominating shareholder group, a member of the immediate family of the nominating shareholder or any member of the nominating shareholder group, or an employee of the nominating shareholder or any member of the nominating shareholder group? Would such a limitation unnecessarily restrict access by shareholders to the proxy process?

D.14. Should eligibility criteria include a prohibition on agreements between companies and its management and nominating shareholders, as proposed? Would such a prohibition inhibit desirable negotiations between shareholders and boards or nominating committees regarding nominees for directors? Should the prohibition provide an exception to permit such negotiations, as proposed? If so, what should the relevant limitations be?

D.15. Should the nominee be required to make any of the representations (*e.g.,* the independence representation), either in addition to or instead of, the nominating shareholder or group? If so, should these representations be included in the shareholder notice on Schedule 14N or in some other document?

D.16. Should there be a nominee eligibility criterion that would exclude an otherwise eligible nominee where that nominee has been included in the company's proxy materials as a candidate for election as director but received a minimal percentage of the vote? If so, what would be the appropriate percentage (*e.g.,* 5%, 10%, 15%, 25%, or 35%)? If so, for how long should the nominee be excluded (*e.g.,* 1 year, 2 years, 3 years, 4 years, 5 years, permanently)?

5. Maximum Number of Shareholder Nominees To Be Included in Company Proxy Materials

We do not intend for proposed Rule 14a–11 to be available for any shareholder or group that is seeking to change the control of the issuer or to gain more than a limited number of seats on the board. The existing procedures regarding contested elections of directors are intended to continue to fulfill that purpose.[182] We also note that by allowing shareholder nominees to be included in a company's proxy materials, the cost of the solicitation is essentially shifted from the individual shareholder or group to the company and thus, all of the shareholders. We do not believe that an election contest conducted by a shareholder to change the control of the issuer or to gain more than a limited number of seats should be funded out of corporate assets. Further, extensive changes in board membership, or the possibility of such changes as a result of additional nominees being included in the proxy statement, have the potential to be disruptive to the board, while also potentially being confusing to shareholders. Amending our rules to provide for the inclusion of shareholder nominees for directors in a company's proxy materials is a significant change. Given the novelty of such a change, we believe it is appropriate to take an incremental approach as a first step and reassess at a later time to determine whether additional changes would be appropriate.

As proposed, a company would be required to include no more than one shareholder nominee or the number of nominees that represents 25 percent of the company's board of directors, whichever is greater.[183] Where a company has a director (or directors) currently serving on its board of directors who was elected as a shareholder nominee pursuant to Rule 14a–11, and the term of that director extends past the date of the meeting of shareholders for which the company is soliciting proxies for the election of directors, the company would not be required to include in its proxy materials more shareholder nominees than could result in the total number of directors serving on the board that were elected as shareholder nominees being greater than one shareholder nominee or 25 percent of the company's board of directors, whichever is greater.[184] We believe this limitation is appropriate to reduce the possibility of a nominating shareholder or group using the proposed new rule as a means to effect a change in control of a company or to gain more than a limited number of seats on the board by repeatedly nominating additional candidates for director. We note that in the 2003 Proposal, the Commission proposed to require companies to include a set number of nominees, rather than a percentage of the board, as proposed today.[185] We believe that using a percentage in the rule will promote ease of use and alleviate any concerns that a company may increase its board size in an effort

[181] 17 CFR 240.10A–3.

[182] *See, e.g.,* Exchange Act Rule 14a–12(c).

[183] *See* proposed Rule 14a–11(d)(1). According to information from RiskMetrics, based on a sample of 1,431 public companies, in 2007, the median board size was 9, with boards ranging in size from 4 to 23 members. Approximately 40% of the boards in the sample had 8 or fewer directors, approximately 60% had between 9 and 19 directors, and less than 1% had 20 or more directors.

[184] *See* proposed Rule 14a–11(d)(2). Depending on board size, 25% of the board may not result in a whole number. In those instances, the maximum number of shareholder nominees for director that a registrant will be required to include in its proxy materials will be the closest whole number below 25%. *See* Instruction 1 to paragraph (d).

[185] Comments on the 2003 Proposal provided a range of views regarding the appropriate number of shareholder nominees. Commenters that supported the use of a percentage, or combination of a set number and a percentage, to determine the number of shareholder nominees suggested percentages ranging from 20% to 35%. *See* 2003 Summary of Comments.

to reduce the effect of a shareholder nominee elected to the board.

Proposed Rule 14a–11(d)(3) would address situations where more than one shareholder or group would be eligible to have its nominees included in the company's form of proxy and disclosed in its proxy statement pursuant to the proposed rule. In those situations, the company would be required to include in its proxy statement and form of proxy the nominee or nominees of the first nominating shareholder or group from which it receives timely notice of intent to nominate a director pursuant to the rule, up to and including the total number of shareholder nominees required to be included by the company.[186] Where the first nominating shareholder or group from which the company receives timely notice does not nominate the maximum number of directors allowed under the rule, the nominee or nominees of the next nominating shareholder or group from which the company receives timely notice of intent to nominate a director pursuant to the rule would be included in the company's proxy materials, up to and including the total number of shareholder nominees required to be included by the company.

Although in 2003 we proposed a standard under which the largest shareholder or group would have their nominee or nominees included in the company proxy materials and the limited number of shareholders that commented did not generally object to such a standard,[187] after further consideration we believe that such a standard might be difficult for companies to administer because it would lack certainty. By using a first-in standard, a company would be able to begin preparing its materials and coordinating with the nominating shareholder or group immediately upon receiving an eligible nomination rather than waiting to see whether another nomination from a larger nominating shareholder or group is submitted before the notice deadline. This approach also may be fairer to the shareholder whose notice is received first and may provide certainty to the shareholder because it eliminates the possibility that the shareholder's nominee will be excluded as a result of a larger shareholder subsequently submitting a nominee.

Request for Comment

E.1. Is it appropriate to include a limitation on the number of shareholder director nominees? If not, how would the proposed rules be consistent with our intention not to allow Rule 14a–11 to become a vehicle for changes in control?

E.2. If there should be a limitation, is the proposed maximum percentage of shareholder nominees for director that we have proposed appropriate? If not, should the maximum percentage be higher (*e.g.,* 30%, 35%, 40%, or 45%) or lower (*e.g.,* 10%, 15%, or 20%)? Should the percentage vary depending on the size of the board? Should the limitation be the greater or lesser of a specified number of nominees or percentage of the total number of directors on the board? Is it appropriate to permit more than one shareholder nominee regardless of the size of the company's board of directors?

E.3. In instances where 25% of the board does not result in a whole number, the maximum number of shareholder nominees for director that a registrant will be required to include in its proxy materials will be the closest whole number below 25%. Is it appropriate to round down in this instance? Should we instead round up to the nearest whole number above 25%? Is a rounding rule necessary?

E.4. Should the proposed rule address situations where the governing documents provide a range for the number of directors on the board rather than a fixed number of board seats? If so, what changes to the rule would be necessary?

E.5. The proposal contemplates taking into account incumbent directors who were nominated pursuant to proposed Rule 14a–11 for purposes of determining the maximum number of shareholder nominees. Is that appropriate? Should there be a different means to account for such incumbent directors?

E.6. Should the procedure address situations in which, due to a staggered board, fewer director positions are up for election than the maximum permitted number of shareholder nominees? If so, how? Should the maximum number be based on the number of directors to be elected rather than to the overall board size?

E.7. Should any limitation on shareholder nominees take into account incumbent directors who were nominated outside of the Rule 14a–11 process, such as pursuant to an applicable state law provision, a company's governing documents, or a proxy contest? If so, should such directors be counted as ''shareholder nominees'' for purposes of determining the 25%?

E.8. Should any limitation on shareholder nominees take into account shareholder nominees for director that a company includes in its proxy materials other than pursuant to Rule 14a–11 (*e.g.,* voluntarily)?

E.9. Should Rule 14a–11 provide an exception for controlled companies or companies with a contractual obligation that permits a certain shareholder or group of shareholders to appoint a set number of directors? Should a nominating shareholder or group only be permitted to submit nominees for director based upon the number of director seats the nominating shareholder is entitled to vote on? For example, if a board consists of 10 directors and the company is contractually obligated to permit a certain shareholder or shareholders to appoint five directors to the board, should shareholders entitled to vote on the remaining five director slots be limited to submitting nominees based on a board size of five rather than 10, meaning that a nominating shareholder may submit one nominee for inclusion in the company's proxy materials?

E.10. We have proposed a limitation that permits the nominating shareholder or group that first provides notice to the company to include its nominee or nominees in the company's proxy materials where there is more than one eligible nominating shareholder or group. Is this appropriate? If not, should there be different criteria for selecting the shareholder nominees (*e.g.,* largest beneficial ownership, length of security ownership, random drawing, allocation among eligible nominating shareholders or groups, etc.)? Rather than using criteria such as that proposed, should companies have the ability to select among eligible nominating shareholders or groups? If so, what criteria should the company be required to use in doing so?

E.11. If the Commission adopts a ''first-in'' approach, should the first shareholder or group get to nominate up to the total number of nominees required to be included by the company or, where there is more than one nominating shareholder or group and more than one slot for nominees, should the slots be allocated among proposing shareholders according to, for example, the order in which the shareholder or group provided notice to the company?

E.12. Under the proposal, where the first nominating shareholder or group to deliver timely notice to the company does not nominate the maximum number of directors allowed under the rule, the nominee or nominees of the next nominating shareholder or group to deliver timely notice of intent to nominate a director pursuant to the rule would be included in the company's proxy materials, up to and including the

[186] This requirement is set forth in proposed Rule 14a–11(d)(3).

[187] *See* 2003 Summary of Comments.

total number of shareholder nominees required to be included by the company. Should the rule specify how to determine which of a second nominating shareholder's or group's nominees are to be selected where there are more nominees than available spots under the rule? Should Rule 14a–11 provide that only one nominating shareholder or group may have their nominee or nominees included in the company proxy materials, regardless of whether they nominate the maximum number allowed under the rule?

E.13. Would the ''first-in'' approach result in an undue advantage to the first shareholder or group to submit a nomination? Would such an approach result in a race to be the first in?

6. Notice and Disclosure Requirements

To submit a nominee for inclusion in the company's proxy statement and form of proxy, proposed Rule 14a–11 would require that the nominating shareholder or group provide a notice on Schedule 14N to the company of its intent to require that the company include that shareholder's or group's nominee or nominees in the company's proxy materials.[188] The shareholder notice on Schedule 14N would also be required to be filed with the Commission.

The notice would be required to be provided to the company and filed by the date specified by the company's advance notice provision or, where no such provision is in place, no later than 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting. We are proposing 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting as the standard where a company does not have an advance notice provision because we believe that 120 days would provide adequate time for companies to take the steps necessary to include or, where appropriate, to exclude a shareholder nominee for director that is submitted pursuant to Rule 14a–11. If the company did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year, however, then the nominating shareholder must provide notice a reasonable time before the company mails its proxy materials. The company would be required to disclose the date by which the shareholder must submit the required notice in a Form 8–K filed pursuant to proposed Item 5.07 within four business days after the company determines the anticipated meeting date.[189]

The notice would be filed with the Commission on proposed new Exchange Act Schedule 14N on the date the notice is sent to the company.[190] The new Schedule 14N would require:[191]

- The name and address of the nominating shareholder or each member of the nominating shareholder group;
- Information regarding the amount and percentage of securities beneficially owned and entitled to vote at the meeting;
- A written statement from the ''record'' holder of the shares beneficially owned by the nominating shareholder or each member of the nominating shareholder group (usually a broker or bank) verifying that, as of the date of the shareholder notice on Schedule 14N, the shareholder continuously held the securities for at least one year;[192]
- A written statement of the nominating shareholder's or group's intent to continue to own the requisite shares through the shareholder meeting at which directors are elected. Additionally, the nominating shareholder or group would provide a written statement regarding the nominating shareholder's or group's intent with respect to continued ownership after the election;[193] and
- A certification that to the best of the nominating shareholder's or group's knowledge and belief, the securities are not held for the purpose of, or with the effect of, changing the control of the issuer or gaining more than a limited number of seats on the board of directors.[194]

We believe that these disclosures would assist shareholders in making an informed voting decision with regard to any nominee or nominees put forth by the nominating shareholder or group, in that the disclosures would enable shareholders to gauge the nominating shareholder's or group's interest in the company, longevity of ownership, and intent with regard to continued ownership in the company. These disclosures also would be important to the company in determining whether the nominating shareholder or group is eligible to rely on Rule 14a–11 to include a nominee or nominees in the company's proxy materials.

The shareholder notice on Schedule 14N also would include representations concerning the nominating shareholder's or group's eligibility to use Rule 14a–11, as well as disclosure about the nominating shareholder or group and the nominee for director. The disclosure provided by the nominating shareholder or group would be similar to the disclosure currently required in a contested election and would be included by the company in its proxy materials. This disclosure would be required pursuant to proposed new Exchange Act Rule 14a–18. Specifically, the shareholder notice on Schedule 14N would be required to include:

- A representation that the nominating shareholder or group is eligible to submit a nominee under Rule 14a–11;[195]
- A representation that, to the knowledge of the nominating shareholder or group, the candidate's

[188] *See* proposed Rule 14a–11(c), Rule 14a–18 and Rule 14n–1.

[189] *See* proposed Instruction 2 to Rule 14a–11(a) and proposed Rule 14a–18. This would be similar to the requirement currently included in Rule 14a–5(f), which specifies that, where the date of the next annual meeting is advanced or delayed by more than 30 calendar days from the date of the annual meeting to which the proxy statement relates, the company must disclose the new meeting date in the company's earliest possible quarterly report on Form 10–Q. Although registered investment companies generally are not required to file Form 8–K, we are proposing to require them to file a Form 8–K disclosing the date by which the shareholder notice must be provided if the company did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year. *See* proposed Exchange Act Rules 13a–11(b)(2) and 15d–11(b)(2).

[190] In this regard, we propose to amend Rule 13(a)(4) of Regulation S–T to provide that a Schedule 14N will be deemed to be filed on the same business day if it is filed on or before 10 p.m. Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect. This will allow nominating shareholders additional time to file the notice on Schedule 14N and transmit the notice to the company.

[191] In the 2003 Proposal, the Commission proposed to rely on disclosure obtained in a Schedule 13G. The Schedule 13G filing requirement is triggered when a shareholder or group owns more than 5% of the company's securities. In the current proposal, we are proposing ownership thresholds for many companies that are different from the more than 5% threshold proposed in 2003. We nevertheless believe uniform disclosure for all companies, regardless of size, would be appropriate. Therefore, we are proposing a new filing requirement on Schedule 14N, to require certain disclosures regarding the nominating shareholder and nominee that would not otherwise be required to be filed.

[192] This requirement would be applicable only where the nominating shareholder is not the registered holder of the shares and where the shareholder has not filed a Schedule 13D, Schedule 13G, Form 3, Form 4, and/or Form 5, or amendments to those documents. *See* Item 5(a) to proposed Schedule 14N.

[193] *See* proposed Rule 14a–18(f), proposed Item 5(b) of Schedule 14N, proposed Item 7(e) of Schedule 14A, and proposed Item 22(b)(18) of Schedule 14A.

[194] *See* Item 8 of proposed Schedule 14N.

[195] The eligibility standards for nominating shareholders are set forth in proposed Rule 14a–11(b). Pursuant to Rule 14a–18(b), the nominating shareholder would be required to include a representation in the notice that the nominating shareholder or group satisfies the conditions in Rule 14a–11(b).

nomination or initial service on the board, if elected, would not violate controlling state law, federal law, or applicable listing standards (other than a standard relating to independence); [196]

- A representation that, to the knowledge of the nominating shareholder or group, the nominee meets the objective criteria for independence from the company that are set forth in applicable rules of a national securities exchange or national securities association [197] or, in the case of a registered investment company or business development company, that the nominee to the board is not an ''interested person'' of the company as defined in Section 2(a)(19) of the Investment Company Act; [198]
- A representation that neither the nominee nor the nominating shareholder (or any member of the nominating shareholder group, if applicable) has an agreement with the company regarding the nomination of the nominee; [199]
- A statement from the nominee that the nominee consents to be named in the company's proxy statement and to serve on the board if elected, for inclusion in the company's proxy statement; [200]
- A statement that the nominating shareholder or each member of the nominating shareholder group intends to continue to own the requisite amount of securities through the date of the meeting; [201]
- Disclosure about the nominee complying with the requirements of Item 4(b), Item 5(b), and Items 7(a), (b) and (c) and, for investment companies, Item 22(b) of Exchange Act Schedule 14A, for inclusion in the company's proxy statement; [202]
- Disclosure about the nominating shareholder or members of a nominating shareholder group consistent with the disclosure currently required pursuant to Item 4(b) and Item 5(b) of Schedule 14A in a contested election; [203]
- Disclosure about whether the nominating shareholder or member of a nominating shareholder group has been involved in any legal proceeding during the past five years, as specified in Item 401(f) of Regulation S–K. Disclosure pursuant to this section need not be provided if provided in response to Items 4(b) and 5(b) of Schedule 14A; [204]
- The following disclosure regarding the nature and extent of the relationships between the nominating shareholder or group and nominee and the company or any affiliate of the company:
- Any direct or indirect material interest in any contract or agreement between the nominating shareholder or group or the nominee and the company or any affiliate of the company (including any employment agreement, collective bargaining agreement, or consulting agreement);
- Any material pending or threatened litigation in which the nominating shareholder or group or nominee is a party or a material participant and that involves the company, any of its officers or directors, or any affiliate of the company; and
- Any other material relationship between the nominating shareholder or group or the nominee and the company or any affiliate of the company not otherwise disclosed; [205]
- Disclosure of any Web site address on which the nominating shareholder or group may publish soliciting materials; [206] and
- If desired to be included in the company's proxy statement, any statement in support of the shareholder nominee or nominees, which may not exceed 500 words. [207]

We note that the disclosure requirements we have proposed here are substantially similar to the requirements the Commission proposed in the 2003 Proposal. In both cases, the requirements focus on obtaining disclosure similar to what would be obtained in an election contest. In the 2003 Proposal, because the Commission proposed a 5% ownership threshold, nominating shareholders or groups would have been required to file a Schedule 13G, so the Commission also proposed to require certain disclosures and representations from the nominating shareholder and nominee on Schedule 13G rather than create a new schedule. Under the tiered ownership threshold we are proposing, a nominating shareholder or group may hold less than 5% of the company's securities and would not be required to file a Schedule 13G. Accordingly, because we believe that uniform disclosure regardless of company size would be appropriate, we are proposing a new Schedule 14N that would require the same disclosures and representations from the nominating shareholder and nominee regardless of the percentage of the company's securities held by the nominating shareholder or group.

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[196] Proposed Rule 14a–11(a)(2) requires that the nomination and initial board service not violate these standards. This representation would be included in the nominating shareholder's notice pursuant to proposed Rule 14a–18(a).

[197] The representation is not required if the company is not subject to the rules of a national securities exchange or national securities association.

[198] This representation would be included in the nominating shareholder's notice pursuant to proposed Rule 14a–18(c). The criteria for independence would be those generally applicable to directors, and not particular independence requirements, such as the requirements for audit committee members. *See* the Instruction to Rule 14a–18(c).

[199] This representation would be included in the nominating shareholder's notice pursuant to proposed Rule 14a–18(d).

[200] This statement would be included in the nominating shareholder's notice pursuant to proposed Rule 14a–18(e).

[201] *See* proposed Rule 14a–18(f).

[202] This information would be included in the nominating shareholder's notice pursuant to proposed Rule 14a–18(g). This information would identify the nominee, describe certain legal proceedings, if any, related to the nominee, and describe certain of the nominee's transactions and relationships with the company. *See* Items 7(a), (b), and (c) of Schedule 14A. This information also would include biographical information and disclosure about certain interests of the nominee. *See* Item 5(b) of Schedule 14A. With respect to a nominee for director of a registered investment company or business development company, the disclosure would include certain basic information about the nominee and any arrangement or understanding between the nominee and any other person pursuant to which he was selected as a nominee; information about the positions, interests, and transactions and relationships of the nominee and his immediate family members with the company and persons related to the company; information about the amount of equity securities of funds in a fund complex owned by the nominee; and information describing certain legal proceedings related to the nominee, including legal proceedings in which the nominee is a party adverse to, or has a material interest adverse to, the company or any of its affiliated persons. *See* paragraph (b) of Item 22 of Schedule 14A.

[203] This information would be submitted in the nominating shareholder's notice pursuant to proposed Rule 14a–18(h).

[204] *See* proposed Rule 14a–18(i). Similar information is required for a nominee in response to Items 4(b) and 5(b) of Schedule 14A. We believe that it is appropriate to require similar disclosure of information from the nominating shareholder or group.

[205] *See* proposed Rule 14a–18(j).

[206] This information would be included in the nominating shareholder's notice pursuant to proposed Rule 14a–18(k).

[207] *See* proposed Rule 14a–18(*l*). The 500 words would be counted in the same manner as words are counted under Rule 14a–8. Any statements that are, in effect, arguments in support of the nomination would constitute part of the supporting statement. Accordingly, any ''title'' or ''heading'' that meets this test would be counted toward the 500-word limitation. Inclusion of a Web site address in the supporting statement would not violate the 500-word limitation; rather, the Web site address would be counted as one word for purposes of the 500-word limitation. We note that in the 2003 Proposal the Commission proposed that a company would be required to include a nominating shareholder's or group's supporting statement in the company's proxy materials in instances where the company made a statement opposing the nominating shareholder's nominee or nominees and/or supporting company nominees. Most commenters thought that a nominating shareholder's or group's supporting statement should be included in company proxy materials irrespective of whether the company includes its own supporting statement or statement in opposition to a shareholder nominee. *See* 2003 Summary of Comments.

The Schedule 14N would be filed with the Commission in the following manner: [208]

- The filing would include a cover page in the form set forth in proposed Schedule 14N with the appropriate box on the cover page marked to specify that the filing relates to a Rule 14a–11 nomination; [209]
- The filing would be made under the subject company's Exchange Act file number (or in the case of a registered investment company, under the subject company's Investment Company Act file number); and
- The filing would be made on the date the notice is first transmitted to the company.

In order to file the Schedule 14N on EDGAR, a nominating shareholder or group and any nominee that does not already have EDGAR filing codes, and to which the Commission has not previously assigned a user identification number, which we call a ''Central Index Key (CIK)'' code, would need to obtain the codes by filing electronically a Form ID [210] at *https://www/filermanagement.edgarfiling.sec.gov*. The applicant also would be required to submit a notarized authenticating document. If the authenticating document is prepared before the applicant makes the Form ID filing, the authenticating document may be uploaded as a Portable Document Format (PDF) attachment to the electronic filing. An applicant also may submit the authenticating document by faxing it to the Commission within two business days before or after electronically filing the Form ID.[211]

The Schedule 14N would be required to be amended promptly for any material change in the facts set forth in the originally-filed Schedule 14N. In this regard, we would view withdrawal of a nominating shareholder or group, or of a director nominee, and the reasons for any such withdrawal, as a material change. For example, such a withdrawal could be material because it may result in a group no longer meeting the required ownership threshold under Rule 14a–11. The nominating shareholder or group also would be required to file a final amendment to the Schedule disclosing within 10 days of the final results of the election being announced by the company the nominating shareholder's or group's intention with regard to continued ownership of their shares. The nominating shareholder would previously have disclosed their intent with regard to continued ownership of the company's securities in its original notice on Schedule 14N. Filing of the amendment to the Schedule 14N would provide shareholders with information as to whether the outcome of the election may have altered the intent of the shareholder and what further plans with regard to the company the nominating shareholder may have.

The Schedule 14N, as filed with the Commission, as well as any amendments to the Schedule 14N, would be subject to the liability provisions of Exchange Act Rule 14a–9 pursuant to proposed new paragraph (c) to the rule.[212]

In a traditional proxy contest, shareholders would receive the disclosure required by Items 4(b), 5(b), and Item 7 (or Item 22, as applicable) of Schedule 14A as discussed above. The proposed Schedule 14N disclosure requirements are somewhat more expansive in that they also would include the disclosures concerning ownership amount, length of ownership, intent to continue holding the shares through the date of the meeting, and a certification that the nominating shareholder or group is not seeking to change the control of the issuer or to gain more than a limited number of seats on the board of directors. In addition, the proposed disclosure requirements would include representations concerning the nominating shareholder's or group's eligibility to rely on Rule 14a–11 to include a nominee or nominees in the company's proxy statement, as well as representations concerning the nominee's eligibility, and disclosure regarding the nature and extent of the relationships between the nominating shareholder or group and nominee and the company or any affiliate of the company. Today's proposed disclosure requirements are not as extensive, however, as those in the Shareholder Proposals Proposing Release that were not adopted. In that instance, a shareholder that was relying on a company bylaw to include a nominee for director in a company's proxy materials would have had to provide the following disclosures in addition to what we are proposing today:

- A description of the following items that occurred during the 12 months prior to the formation of any plans or proposals, or during the pendency of any proposal or nomination:
- Any material transaction of the shareholder with the company or any of its affiliates, and
- Any discussion regarding the proposal between the shareholder and a proxy advisory firm;
- Any holdings of more than 5% of the securities of any competitor of the company (*i.e.,* any enterprise with the same SIC code); and
- Any meetings or contacts, including direct or indirect communication by the shareholder, with the management or directors of the company that occurred during the 12-month period prior to the formation of any plans or proposals, or during the pendency of the proposal.[213]

Based on the comments we received on the Shareholder Proposals Proposing Release, we believe that requiring such extensive disclosure may be impractical and may serve as a deterrent to shareholders' exercise of their right to nominate directors. We believe that the disclosure we propose today would provide transparency and facilitate shareholders' ability to make an informed voting decision on a shareholder director nominee or nominees without being unnecessarily burdensome on nominating shareholders or groups. We believe that the proposed disclosure would be particularly important because the nominating shareholder or group would not be bound by the same fiduciary duties applicable to the members of a board's nominating committee in selecting director nominees.

Request for Comment

F.1. Are the proposed content requirements of the shareholder notice on Schedule 14N appropriate? Are there matters included in the notice that should be eliminated (*e.g.,* should the

[208] The requirement to file a Schedule 14N with the Commission is set forth in proposed Rule 14n–1 and proposed Rule 14a–18.

[209] The Schedule 14N also would be used for disclosure concerning the inclusion of shareholder nominees in company proxy materials when made pursuant to an applicable state law provision or a company's governing documents, as set out in proposed Rule 14a–19.

[210] 17 CFR 239.63; 249.446; and 274.402.

[211] The authenticating document would need to be manually signed by the applicant over the applicant's typed signature, include the information contained in the Form ID, and confirm the authenticity of the Form ID. If the authenticating document is filed after electronically filing the Form ID, it would need to include the accession number assigned to the electronically filed Form ID as a result of its filing. *See* 17 CFR 232.10(b)(2).

[212] For further discussion, *see* Section III.E.

[213] These disclosures would have applied to either a shareholder proponent of a proposal to amend a company's bylaws to establish procedures for inclusion in the company's proxy materials of shareholder nominees for director or to a nominating shareholder under such an adopted bylaw. A shareholder proponent of a bylaw proposal would also have been required to disclose background information about the proposing shareholder including qualifications and background relevant to the plans or proposals, and any interests or relationships of such shareholder proponent that are not shared generally by the other shareholders of the company and that could have influenced the decision by such proponent to submit a proposal.

nominating shareholder be required to provide disclosure of its intention with regard to continued ownership of the shares after the election, as is proposed)?

F.2. Are there additional matters that should be included? For example, is there additional information that should be included with regard to the nominating shareholder or group or with regard to the shareholder nominee?

F.3. Are the required representations appropriate? Should there be additional representations (*e.g.,* should the nominee be required to make a representation concerning their understanding of their duties under state law if elected and their ability to act in the best interest of the company and all shareholders)? Should any of the proposed representations be eliminated?

F.4. Is five years a sufficient time period for information about whether the nominating shareholder or member of a nominating shareholder group has been involved in any legal proceeding? Should it instead be ten years?

F.5. What should be the consequence of a nominating shareholder or group including materially false information or a materially false representation in the nominating shareholder's or group's notice on Schedule 14N to the company, whether before inclusion of a nominee in the company's proxy materials, after inclusion of a nominee in the company's proxy materials but before the election, or after a nominee has been included in the company's proxy materials and elected? Should it make a difference whether the false information or representation was provided knowingly? Should it make a difference whether the false information or representation was material?

F.6. What should be the consequence to the nominating shareholder or group of submitting the notice on Schedule 14N to the company after the deadline? What should be the consequence of filing the notice on Schedule 14N with the Commission after the deadline? Should a late submission to the company or late filing with the Commission render the nominating shareholder or group ineligible to have a nominee included in the company's proxy materials under Rule 14a–11 with respect to the upcoming meeting, as is currently proposed?

F.7. The proposed instructions to Rule 14a–11 address how to provide disclosure where the nominating shareholder is a ''general or limited partnership, syndicate or other group.'' Is this sufficiently broad to address any nominating shareholders that may use the rule?

F.8. Should a company's advance notice provision govern the timing of the submission of shareholder nominations for directors? If not, should the Commission adopt a specific deadline instead? Should the Commission make no reference to advance notice provisions as they may apply to proxy solicitations and adopt a generally applicable federal standard? Would such an approach better enable consistent exercise by shareholders of their voting and nominating rights across public companies? If the Commission were to establish a federal standard, would 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting be appropriate? Should it be longer (*e.g.,* 150 or 180 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting), or shorter (*e.g.,* 90 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting)?

F.9. In the absence of an advance notice provision, the nominating shareholder or group would be required to submit the notice to the company and file with the Commission no later than 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting. Is this deadline appropriate and workable? If not, what should be the deadline (*e.g.,* 80, 90, 100, 150, or 180 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting)?

F.10. Should there be a specified range of time in which a shareholder is permitted to submit a nominee (*e.g.,* no earlier than 150 days before and no later than 120 days before the date the company mailed its proxy materials the previous year)? Should a different range be used (*e.g.,* should the submission of nominations be limited to no earlier than 120 days and no later than 90 days; no earlier than 180 days and no later than 150 days; or no earlier than 180 days and no later than 120 days before the date the company mailed its proxy statement the previous year)? Does permitting submission of a nominee at any time prior to 120 days before the company mailed its proxy materials the previous year skew the process in favor of certain shareholders? If so, why? If not, why? If a different date range would be more workable, please tell us the range and why.

F.11. The proposed notice requirements address both regularly scheduled annual meetings and circumstances where a company may not have held an annual meeting in the prior year or has moved the date of the meeting more than 30 days from the prior year. Under these circumstances, what is the appropriate date by which a nominating shareholder must submit the notice to the company? Should the Commission adopt a specific deadline for non-regularly scheduled meetings, or rely on a ''reasonable time'' standard? If a ''reasonable time'' standard is adopted, should the company be required to file the Form 8–K announcing the deadline any minimum number of days in advance of the deadline? If so, how many days notice should the company provide and why? What deadline should apply when a company holds a special meeting in lieu of an annual meeting?

F.12. As proposed, an instruction to Form 8–K would specify that a company would be required to file a report pursuant to Item 5.07 within four business days of determining the anticipated meeting date if the company did not hold an annual meeting the previous year or if the annual meeting has been changed by more than 30 calendar days from the date of the previous year's meeting. Is such an instruction necessary? Should the company be required to file the Item 5.07 Form 8–K in less than four business days (*e.g.,* two business days) or more than four business days (*e.g.,* seven business days, 10 business days)?

F.13. Should a registered investment company be required to disclose on Form 8–K the date by which a shareholder or shareholder group must submit the notice to the company of its intent to require its nominees on the company's proxy card? Should this date also be required to be disclosed on the company's Web site, if it has one? Should registered investment companies instead be permitted to provide this disclosure in a different manner?

F.14. As proposed, a shareholder's or group's notice of intent to submit a nomination for director is required to be filed with the Commission on Schedule 14N. Is such a filing appropriate? Should additional or lesser information be filed with the Commission? Should a shareholder or group be required to send the notice to the company without filing the notice on Schedule 14N?

F.15. When should the notice on Schedule 14N be filed with the Commission? Is it sufficient to require the Schedule 14N to be filed at the time it is provided to the company? Should an abbreviated version of the Schedule 14N be filed sooner, before the nominating shareholder or group provides notice to the company, such as at the time a shareholder or group first decides to make a nomination, when the

nominating shareholder first identifies a nominee for director, or some other time? Should it be filed later?

F.16. The notice on Schedule 14N would be required to be amended promptly for any material change in the facts set forth in the originally-filed Schedule 14N. Should the nominating shareholder or group be required to amend the Schedule 14N for any material change in the facts? Why or why not?

F.17. The nominating shareholder or group would be required to file a final amendment to the Schedule disclosing, within 10 days of the final results of the election being announced by the company, the nominating shareholder's or group's intention with regard to continued ownership of their shares. Should the nominating shareholder or group be required to amend the Schedule 14N to disclose their intent regarding continued ownership? Why or why not?

F.18. In situations where a nominating shareholder or group beneficially owns more than 5% of the company's securities, should we permit a combined Schedule 13G/Schedule 14N filing? Should we permit a combined Schedule 13D/Schedule 14N filing? Why or why not?

F.19. Should a nominating shareholder or group be required to file Schedule 14N on EDGAR, as proposed?

F.20. Should the notice be required to include a description of the following items that occurred during the 12 months prior to the formation of any plans or proposals with respect to the nomination, or during the pendency of any nomination: (i) Any material transaction of the shareholder with the company or any of its affiliates, and (ii) any discussion regarding the nomination between the shareholder and a proxy advisory firm?

F.21. Should the nominating shareholder or group and/or nominee be required to disclose any holdings of more than 5% of the securities of any competitor of the company (*i.e.,* any enterprise with the same SIC code)?

F.22. Should the nominating shareholder or group and/or nominee be required to disclose any meetings or contacts, including direct or indirect communication by the shareholder, with the management or directors of the company that occurred during the 12-month period prior to the formation of any plans or proposals with respect to a nomination?

7. Requirements for a Company That Receives a Notice From a Nominating Shareholder or Group

a. Inclusion of a Shareholder Director Nominee

Upon receipt of a shareholder's or group's notice of its intent to require the company to include in its proxy materials a shareholder nominee or nominees pursuant to Rule 14a–11, the company would determine whether any of the events permitting exclusion of the shareholder nominee or nominees has occurred.[214] If not, the company would notify in writing the nominating shareholder or group no later than 30 calendar days before the company files its definitive proxy statement and form of proxy with the Commission that it will include the nominee or nominees. The company would be required to provide this notice in a manner that provides evidence of timely receipt by the nominating shareholder or group.

The company would then include disclosure regarding the shareholder nominee or nominees and the nominating shareholder or group in the company's proxy statement[215] and include the name of the nominee on the company's form of proxy that is included with the proxy statement.[216] With regard to the company's form of proxy, the company could identify any shareholder nominees as such and recommend how shareholders should vote for, against, or withhold votes on those nominees and management nominees on the form of proxy.[217] The company would otherwise be required to present the nominees in an impartial manner in accordance with Rule 14a–4. Under the current rules, a company may provide shareholders with the option to vote for or withhold authority to vote for the company's nominees as a group, provided that shareholders also are given a means to withhold authority for specific nominees in the group. In our view, this option would not be appropriate where the company's form of proxy includes shareholder nominees, as grouping the company's nominees may make it easier to vote for all of the company's nominees than to vote for the shareholder nominees in addition to some of the company nominees. Accordingly, when a shareholder nominee is included, the proposed rules would not permit a company to provide shareholders the option of voting for or withholding authority to vote for the company nominees as a group, but would instead require that each nominee be voted on separately.[218]

A company also would be required to include in its proxy statement, if desired by the nominating shareholder or group, a statement by the nominating shareholder or group in support of the shareholder nominee or nominees. In this regard, we believe that not only should a company be able to include a statement in support of the company nominees in its proxy statement, provided that it complies with Rule 14a–9, we also are of the view that a nominating shareholder or group should be afforded a similar opportunity. Accordingly, we are proposing to require a company to include a nominating shareholder's or group's statement of support for the shareholder nominee or nominees, so long as the statement of support does not exceed 500 words.[219] This statement must be provided to the company in the shareholder notice on Schedule 14N.[220]

In addition, both the company and the nominating shareholder or group would be able to solicit in favor of their nominees outside the proxy statement (for example, on a designated website), provided that such solicitations were made within the parameters of the

[214] *See* proposed Rule 14a–11(f).

[215] Under the proposed rules, inclusion of a shareholder nominee in the company's proxy materials would not require the company to file a preliminary proxy statement provided that the company was otherwise qualified to file directly in definitive form. In this regard, the proposed rules make clear that inclusion of a shareholder nominee would not be deemed a solicitation in opposition. *See* proposed revisions to Rule 14a–6(a)(4) and Note 3 to that rule.

[216] These requirements are set forth in proposed Rule 14a–11(a), proposed Rule 14a–18(g)–(*l*) and proposed amendments to Rule 14a–4(b)(2). In addition, we are proposing to add paragraph (e) to Item 7 of Schedule 14A (and, for registered investment companies and business development companies, paragraph (18) to Item 22(b) of Schedule 14A) to state that the registrant must include the disclosure required from the nominating shareholder under proposed Rule 14a–11(a).

[217] This would be similar to the current practice with regard to shareholder proposals submitted pursuant to Rule 14a–8 where companies identify the shareholder proposals and provide a recommendation to shareholders as to how they should vote on those proposals.

[218] *See* proposed Rule 14a–4(b)(2)(iv). We anticipate that companies would continue to be able to solicit discretionary authority to vote a shareholder's shares for the company nominees, as well as to cumulate votes for the company nominees in accordance with applicable state law, where such state law provides for cumulative voting.

[219] *See* proposed Rule 14a–11(a). In counting the 500 words, any statements that are, in effect, arguments in support of the proposal would be viewed as part of the supporting statement. Accordingly, any ''title'' or ''heading'' that meets this test would be counted toward the 500-word limitation. Inclusion of a website address in the supporting statement would not violate the 500-word limitation; rather, the website address would be counted as one word for purposes of the 500-word limitation.

[220] *See* proposed Rule 14a–18(*l*).

applicable proxy rules. Any written soliciting materials published, sent or given by the nominating shareholder or group outside the company's proxy statement would be required to be filed with the Commission in accordance with proposed Rule 14a–2(b)(7) or (b)(8) on the date of first use.

b. Excluding a Shareholder Director Nomination That Does Not Comply With the Requirements of Rule 14a–11

A company may determine that it is not required under proposed Rule 14a–11 to include a nominee from a nominating shareholder or group in its proxy materials if it determines any of the following:

- Proposed Rule 14a–11 is not applicable to the company;
- The nominating shareholder or group has not complied with the requirements of Rule 14a–11;
- The nominee does not meet the requirements of Rule 14a–11;
- Any representation required to be included in the notice to the company is false or misleading in any material respect; or
- The company has received more nominees than it is required to include by proposed Rule 14a–11 and the nominating shareholder or group is not entitled to have its nominee included under the criteria proposed in Rule 14a–11(d)(3).[221]

The nominating shareholder or group would need to be notified of the company's determination not to include the shareholder nominee in sufficient time to consider the validity of any determination to exclude the nominee.[222] In this regard, we note the time-sensitive nature of Rule 14a–11 and the interpretive issues that may arise in applying the new rule. Accordingly, the rules that we are proposing, which set out the process by which a company would determine whether to include a shareholder nominee and notify the nominating shareholder or group, include a proposed procedure by which companies would send a notice to the Commission where the company intends not to include a shareholder nominee in its proxy materials, and could seek staff advice—through a no-action request—with respect to that determination.[223] This procedure is modeled after the staff no-action process used in connection with shareholder proposals under Rule 14a–8.

In addition, we have proposed a process by which a nominating shareholder or group may remedy certain eligibility or procedural deficiencies in a nomination.[224] The various time deadlines set out in the proposed process were determined by considering the appropriate balance between companies' needs in meeting printing and filing deadlines for their shareholder meetings with shareholders' need for adequate time to satisfy the requirements of the rule. In doing so, we considered the timing requirements and deadlines in Rule 14a–8 when crafting the requirements and deadlines for Rule 14a–11; however, due to the potential complexity of the nomination process, we determined that it would be appropriate to provide additional time for the process. For example, once a nominating shareholder submits a nominee pursuant to Rule 14a–11, the company must consider the nominee submitted and make a determination as to whether to include the nominee or submit a no-action request pursuant to Rule 14a–11(f). A nominating shareholder will be afforded time to respond to the no-action request, and the staff will need time to process the request. In addition, a company may need time after receipt of the no-action response from the staff to finalize the proxy materials.

The following process would apply when a company receives a shareholder nomination under Rule 14a–11:

- Upon receipt of a shareholder's or shareholder group's notice of intent to nominate a director or directors, the company would determine whether any of the eligibility requirements have not been satisfied by the nominating shareholder or group or nominee or nominees and whether the company will seek to exclude the shareholder nominee or nominees; [225]
- If the company determines that the eligibility requirements have not been satisfied by the nominating shareholder or group or nominee or nominees and it seeks to exclude the shareholder nominee or nominees, the company would notify in writing the nominating shareholder or group of this determination, at the business address, facsimile number and/or e-mail address provided in the nominating shareholder's or group's notice to the company. This notice must be postmarked or transmitted electronically no later than 14 calendar days after it receives the shareholder notice of intent to nominate. The company should provide this notice in a manner that provides evidence of receipt by the nominating shareholder or group; [226]
- The company's notice to the nominating shareholder or group that it has determined that the company may exclude a shareholder nominee or nominees would be required to include an explanation of the company's basis for determining that it may exclude the nominee or nominees; [227]
- The nominating shareholder or group would have 14 calendar days after receipt of the written notice of deficiency to respond to that notice and correct any eligibility or procedural deficiencies identified in that notice. The nominating shareholder's or group's response must be postmarked, or transmitted electronically, no later than 14 calendar days from the date the shareholder received the company's notice. As with the company's notice, the nominating shareholder or group should provide the response in a manner that provides evidence of its receipt by the company; [228]
- Neither the composition of a nominating shareholder group nor a shareholder nominee could be changed as a means to correct a deficiency identified in the company's notice to the nominating shareholder or group—those matters would be required to remain as they were described in the notice to the company (we believe that to allow otherwise could serve to undermine the purpose of the notice deadline provided for in the rule); however, where a nominating shareholder or group inadvertently submits a number of nominees that exceeds the maximum number required to be included by the company, the nominating shareholder or group may specify which nominee or

[221] *See* proposed Rule 14a–11(a).

[222] *See* proposed Rule 14a–11(f).

[223] *See* proposed Rule 14a–11(f)(7)–(14). As is the case with regard to the Rule 14a–8 staff no-action process, we encourage companies and shareholders to attempt to resolve disputes independently. To the extent that a company and nominating shareholder or group are able to resolve an issue at any point during the staff no-action process, the company would withdraw its request for a no-action position from the staff.

[224] *See* proposed Rule 14a–11(f)(3)–(6).

[225] *See* proposed Rule 14a–11(f)(1)–(3). *See also* proposed Rule 14a–11(a) detailing circumstances permitting exclusion of shareholder nominee or nominees. Where a company receives more than one nominee from an eligible nominating shareholder or group and some of those nominees are eligible to be placed in the company's proxy materials, the company's determination that one or more of the nominating shareholder's or group's nominees are not eligible will not affect the company's obligation to place the eligible nominee or nominees in its proxy materials.

[226] *See* proposed Rule 14a–11(f)(3).

[227] *See* proposed Rule 14a–11(f)(4).

[228] *See* proposed Rule 14a–11(f)(5). We believe it is necessary to impose a time limit for a nominating shareholder's response to a notice of deficiency due to the potential time-sensitive nature of the nomination process and a company's preparation of its proxy materials for filing.

nominees are not to be included in the company's proxy materials; [229]

• If, upon review of the nominating shareholder's response, the company determines that the company still may exclude a shareholder nominee or nominees, after providing the requisite notice of and time for the nominating shareholder or group to remedy any eligibility or procedural deficiencies in the nomination, the company would be required to provide notice of the basis for its determination to the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The Commission staff could permit the company to make its submission later than 80 days before the company files its definitive proxy statement and form of proxy if the company demonstrates good cause for missing the deadline; [230]

• The company's notice to the Commission would include: (a) Identification of the nominating shareholder or each member of the nominating shareholder group, as applicable; (b) the name of the nominee or nominees; (c) an explanation of the company's basis for determining that it may exclude the nominee or nominees; and (d) a supporting opinion of counsel when the company's basis for excluding a nominee or nominees relies on a matter of state law; [231]

• Unless otherwise provided in Rule 14a–11 (*e.g.,* the nominating shareholder's or group's obligation to demonstrate that it responded to a company's notice of deficiency, where applicable, within 14 calendar days after receipt of the notice of deficiency), the burden would be on the company to demonstrate that it may exclude a nominee or nominees; [232]

• The company would be required to file its notice of its intent to exclude with the Commission and simultaneously provide a copy to the nominating shareholder or each member of the nominating shareholder group; [233]

• The nominating shareholder or group could submit a response to the company's notice to the Commission. This response would be postmarked or transmitted electronically no later than 14 calendar days after the nominating shareholder's or group's receipt of the company's notice to the Commission. The nominating shareholder or group would be required to provide a copy of its response to the Commission simultaneously to the company; [234]

• The Commission staff would, at its discretion, provide an informal statement of its views (a no-action letter) to the company and the nominating shareholder or group; [235]

• The company would provide the nominating shareholder or group with notice, no later than 30 calendar days before it files its definitive proxy statement and form of proxy with the Commission, of whether it will include or exclude the shareholder nominee or nominees; [236]

• All materials submitted to the Commission in relation to Rule 14a–11(f) would be publicly available upon submission; [237] and

• The company or any nominating shareholder or group could request that the staff seek the Commission's views with respect to a determination of the staff under Rule 14a–11(f). The staff, upon such a request or on its own motion, would generally present questions to the Commission that involve matters of substantial importance and where the issues are novel or highly complex, although the granting of a request for an informal statement by the Commission is entirely within its discretion.[238]

The process generally would operate as follows:

Due date	Action required
Date set by company's advance notice provision or, in the absence of such a provision, 120 days before the anniversary of the date that the company mailed the prior year's proxy materials.	Nominating shareholder or group must provide and file notice on Schedule 14N.
Within 14 calendar days after the company's receipt of the nominating shareholder's or group's notice on Schedule 14N.	Company must notify the nominating shareholder or group of any determination not to include the nominee or nominees.
Within 14 calendar days after the nominating shareholder's or group's receipt of the company's deficiency notice.	Nominating shareholder must respond to the company's deficiency notice.
No later than 80 calendar days before the company files its definitive proxy statement and form of proxy with the Commission.	Company must provide notice of its intent to exclude the nominating shareholder's or group's nominee or nominees and the basis for its determination to the Commission.
Within 14 calendar days of the nominating shareholder's or group's receipt of the company's notice to the Commission.	Nominating shareholder or group could submit a response to the company's notice to the Commission staff.
As soon as practicable	Commission staff would, at its discretion, provide an informal statement of its views to the company and the nominating shareholder or group.
No later than 30 calendar days before the company files its definitive proxy statement and form of proxy with the Commission.	Company must provide the nominating shareholder or group with notice of whether it will include or exclude the shareholder's nominee or nominees.

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[229] *See* proposed Rule 14a–11(f)(6).

[230] *See* proposed Rule 14a–11(f)(7). This would be similar to the procedures the company must follow if it intends to exclude a shareholder proposal under Rule 14a–8. *See* Rule 14a–8(j). Given the similarities in the processes, we are proposing an 80-day deadline for Rule 14a–11(f).

[231] *See* proposed Rule 14a–11(f)(8).

[232] *See* proposed Rule 14a–11(f)(9).

[233] *See* proposed Rule 14a–11(f)(10).

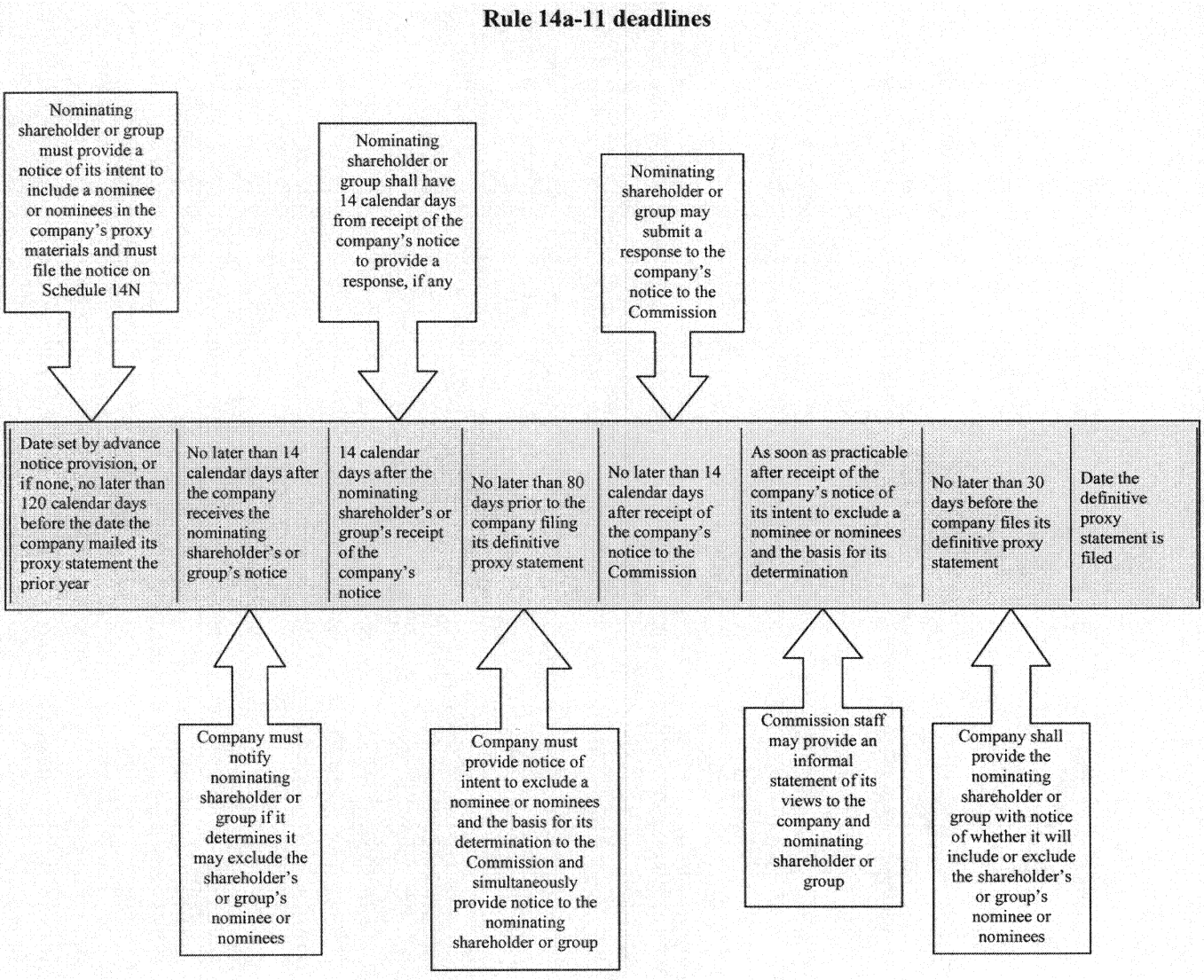
[234] *See* proposed Rule 14a–11(f)(11). A nominating shareholder group may, but is not required to, respond to a company's notice to the staff.

[235] *See* proposed Rule 14a–11(f)(12). The staff's no-action responses to submissions made pursuant to proposed Rule 14a–11(f) would reflect only informal views. The staff determinations reached in these no-action letters would not, and cannot, adjudicate the merits of a company's position with respect to exclusion of a shareholder nominee under Rule 14a–11. Accordingly, a discretionary staff determination would not preclude an interested person from pursuing a judicial determination regarding the application of Rule 14a–11.

[236] *See* proposed Rule 14a–11(f)(13).

[237] *See* proposed Rule 82a, which would state that materials filed with the Commission pursuant to proposed Rule 14a–11(f), written communications related thereto received from any person, and each related no-action letter or other written communication issued by the staff of the Commission, shall be made available to any person upon request for inspection or copying. This rule would be similar to Rule 82, which applies to no-action requests related to shareholder proposals.

[238] *See* Commission Rules of Informal and Other Procedures Rule 202.1(d).



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Request for Comment

G.1. Under proposed Rule 14a–11(a) a company would not be required to include a shareholder nominee where: (1) Applicable state law or the company's governing documents prohibit the company's shareholders from nominating a candidate for director; (2) the nominee's candidacy or, if elected, board membership, would violate controlling state law, federal law or rules of a national securities exchange or national securities association; (3) the nominating shareholder or group does not meet the rule's eligibility requirements; (4) the nominating shareholder's or group's notice is deficient, (5) any representation in the nominating shareholder's or group's notice is false in any material respect, or (6) the nominee is not required to be included in the company's proxy materials due to the proposed limitation on the number of nominees required to be included. Proposed Rule 14a–11(f)(1) provides that the company shall determine whether any of these events have occurred. Will companies be able to make this determination? Why or why not?

G.2. As proposed, neither the composition of a nominating shareholder group nor a shareholder nominee could be changed as a means to correct a deficiency identified in the company's notice to the nominating shareholder or group. Should we permit the nominating shareholder group to change its composition to correct an identified deficiency, such as a failure of the group to meet the requisite ownership threshold? Should the nominating shareholder or group be permitted to submit a replacement shareholder nominee in the event that it is determined that a nominee does not meet the eligibility criteria?

G.3. As proposed, inclusion of a shareholder nominee in the company's proxy materials would not require the company to file a preliminary proxy statement provided that the company was otherwise qualified to file directly in definitive form. In this regard, the proposed rules make clear that inclusion of a shareholder nominee would not be deemed a ''solicitation in opposition.'' Is this appropriate or should the inclusion of a nominee instead be viewed as a solicitation in opposition that would require a company to file its proxy statement in preliminary form? Should we view inclusion of a shareholder nominee as a solicitation in opposition for other purposes (*e.g.,* expanded disclosure obligations)?

G.4. Under the proposal, companies would not be able to provide shareholders the option of voting for the company's slate of nominees as a whole. Should we allow companies to provide

that option to shareholders? Are any other revisions to the form of proxy appropriate? Would a single ballot or ''universal ballot'' that includes both company nominees and shareholder nominees be confusing? Would a universal ballot result in logistical difficulties? If so, please specify.

G.5. Is it appropriate to require that the company include in its proxy statement a supporting statement by the nominating shareholder or group? If so, should this requirement be limited to instances where the company wishes to make a statement opposing the nominating shareholder's nominee or nominees or supporting company nominees? Is it appropriate to limit the nominating shareholder's or group's supporting statement to 500 words? If not, what limit, if any, is more appropriate (*e.g.,* 250, 750, or 1,000 words)? Should the limit be 500 words per nominee, or some other number (*e.g.,* 250, 750, or 1,000 words)? Should the company's supporting statement be similarly limited? Why or why not?

G.6. Should the rule explicitly state that the nominating shareholder's or group's supporting statement may contain statements opposing the company's nominees? Would it be appropriate to require a company to include a nominating shareholder's or group's statement of opposition in its proxy materials?

G.7. Is the 14-day time period for the company to respond to a nominating shareholder's notice or for the nominating shareholder to respond to a company's notice of deficiency sufficient? Should the time period be longer (*e.g.,* 20 days, 25 days, 30 days) or shorter (*e.g.,* 10 days, 7 days, 5 days)? Should the rule explicitly set out the effect of a company providing the notice late (*e.g.,* the company may not exclude the nominee) or of a shareholder responding to this notice late (*e.g.,* the nominee may be excluded)?

G.8. Is the 80-day requirement for submission of the company's notice to the Commission sufficient? If not, should the requirement be increased (*e.g.,* 90 days, 100 days, 120 days, or more) or decreased (*e.g.,* 75 days, 60 days, or less)? Is the proposed provision under which the staff could permit the company to make its submission later than 80 days before filing its definitive proxy statement where the company demonstrates good cause appropriate? If not, why not? Should the rule more explicitly discuss the effect of such a late filing?

G.9. Is the 14-day time period for the nominating shareholder to respond to the receipt of a company's notice to the Commission of its intent to exclude the nominee sufficient? Should it be longer (*e.g.,* 20 days, 25 days, 30 days) or shorter (*e.g.,* 10 days, 7 days, 5 days)? Should the rule explicitly set out the effect of a shareholder responding to the company's notice late (*e.g.,* the nominee may be excluded)?

G.10. Is the requirement that the company notify the nominating shareholder or group of whether it will include or exclude the nominating shareholder's or group's nominee or nominees no later than 30 calendar days before the company files its definitive proxy statement and form of proxy with the Commission appropriate and workable? If not, what should the deadline be (*e.g.,* 40 calendar days before filing definitive proxy materials, 35 days before filing definitive proxy materials, 25 calendar days before filing definitive proxy materials, 20 calendar days before filing definitive proxy materials)? Should the rule explicitly set out the effect of a company sending this notice late?

G.11. Would the timing requirements overall allow a company to comply with the requirements of e-proxy?

G.12. Do the proposed timing requirements, in the aggregate, allow sufficient time for the informal staff review process? How far in advance of filing definitive proxy materials do companies typically begin printing those materials? If the proposed timing requirements do not allow sufficient time for the informal staff review process, please tell us specifically which timing requirements pose a problem and suggest a specific alternative time that would be sufficient.

G.13. What should happen if one of the deadlines specified in the proposed process in Rule 14a–11(f) falls on a Saturday, Sunday, or federal holiday? Should the deadline be counted from the preceding or succeeding federal work day?

G.14. Should the informal staff review process be the same for reporting companies (other than registered investment companies), registered investment companies, and business development companies? Should there be unique procedures for different types of entities? If so, what is unique to a particular type of entity that would require a unique process?

G.15. Should there be a method for a company to obtain follow-up information after a nominating shareholder or group submits an initial response to the company's notice of determination? If so, should that follow-up method have similar time frames as those related to the initial request and response? What adjustments to timing might be required for the nominating shareholder or group to respond to any such follow-up request?

G.16. The proposed requirement for a legal opinion regarding state law is modeled on the requirement in Rule 14a–8. Is such a requirement necessary and appropriate in the context of proposed Rule 14a–11? Should it be changed in any way (*e.g.,* should it be revised to require a legal opinion regarding foreign law for those instances where there may be a conflict with a company's country of incorporation where the company is organized in a non-U.S. jurisdiction but does not meet the definition of foreign private issuer)?

G.17. What process would be appropriate for addressing disputes concerning a company's determination? Is the proposed staff review process an appropriate means to address disputes concerning the company's determination? If not, by what other means should a company's determination be subject to review? Exclusively by the courts? Are there other processes we should consider?

G.18. In the absence of a staff review process, what would be the potential litigation cost associated with the resolution of disputes concerning company determinations? Would shareholder meetings be delayed due to such litigation or threat of litigation?

G.19. Are there certain types of company determinations that should or should not be subject to the staff review process (*e.g.,* whether a nominating shareholder or group meets the required ownership threshold)? Please provide specific examples in your response.

G.20. How should we address the situation where a nominating shareholder qualifies, provides its notice, and submits all of the nominees a company is required to include, then becomes ineligible under the rule? Under what circumstances should a second shareholder or group be able to nominate directors? If the second nominating shareholder or group provided a notice before the first shareholder became ineligible? Should it matter whether a company had notified the second nominating shareholder or group that it intended to exclude their nominee or nominees?

8. Application of the Other Proxy Rules to Solicitations by the Nominating Shareholder or Group

As proposed, Rule 14a–11 would permit shareholders to aggregate their securities with other shareholders in order to meet the applicable minimum ownership threshold to nominate a director. Accordingly, we anticipate that shareholders would, in many instances,

engage in communications with other shareholders in an effort to form a nominating shareholder group that would be deemed solicitations under the proxy rules. In 2003 we proposed an exemption from certain of the proxy rules to enable shareholders to communicate for the limited purpose of forming a nominating shareholder group without filing and disseminating a proxy statement. To qualify for the exemption, shareholders would have had two options. The communications would either have been made to a limited number of shareholders or, in the alternative, to an unlimited number of shareholders, provided that the communication was limited in content and filed with the Commission. Some commenters supported adoption of limited exemptions,[239] while others stated that the exemptions were unnecessary or duplicative of existing exemptions from the proxy rules. In particular, commenters expressed concerns about the exemption for solicitations not involving more than 30 persons in connection with the formation of a nominating security holder group.[240] These commenters believed the 30-person exemption might be used for undeclared control purposes and believed that there was no reason to replace the 10-person exemption set forth in Exchange Act Rule 14a–2(b)(2), which permits limited testing of the waters before application of the notice and filing requirements of the proxy rules.[241]

After considering further the need for an exemption, and in particular the comments received on the 2003 Proposal, we are proposing an exemption from the proxy rules for communications made in connection with using proposed Rule 14a–11[242] that are limited in content and filed with the Commission.[243] We believe this limited exemption will facilitate shareholders' use of proposed Rule 14a–11 and remove concerns shareholders seeking to use the rule may have regarding certain communications with other shareholders regarding their intent to submit a nomination pursuant to the rule. The exemption would not apply to oral communications because such communications could not easily satisfy the filing requirement, which we believe is important in determining compliance with the content restriction in the proposed exemption. As proposed, Exchange Act Rules 14a–3 to 14a–6 (other than paragraphs 14a–6(g) and 14a–6(p)), 14a–8, 14a–10, and 14a–12 to 14a–15 would not apply to any solicitation by or on behalf of any shareholder in connection with the formation of a nominating shareholder group, provided that:

- Each written communication includes no more than:
- A statement of the shareholder's intent to form a nominating shareholder group in order to nominate a director under the proposed rule;
- Identification of, and a brief statement regarding, the potential nominee or nominees or, where no nominee or nominees have been identified, the characteristics of the nominee or nominees that the shareholder intends to nominate, if any;
- The percentage of securities that the shareholder beneficially owns or the aggregate percentage owned by any group to which the shareholder belongs; and
- The means by which shareholders may contact the soliciting party;[244] and
- Any written soliciting material published, sent or given to shareholders in accordance with the terms of this provision is filed with the Commission by the nominating shareholder, under the company's Exchange Act file number (or in the case of a registered investment company, under the company's Investment Company Act file number), no later than the date the material is first published, sent or given to shareholders. The soliciting material would be required to include a cover page in the form set forth in Schedule 14A, with the appropriate box on the cover page marked.[245]

In this regard, we note that shareholders also would have the option to structure their solicitations, whether written or oral, to comply with an existing exemption from the proxy rules, including the exemption for solicitations of no more than 10 shareholders,[246] and the exemption for certain communications that take place in an electronic shareholder forum.[247]

Both the nominating shareholder or group and the company may wish to solicit in favor of their nominees for director by various means, including orally, by U.S. mail, electronic mail, and Web site postings. While the company ultimately would file a proxy statement and therefore could rely on the existing proxy rules to solicit outside the proxy statement,[248] shareholders could be limited in their soliciting activities under the current proxy rules. Accordingly, we are proposing a new exemption to the proxy rules providing that solicitations by or on behalf of a nominating shareholder or group in support of a nominee included in the company's proxy statement and form of proxy in accordance with the proposed rule, would not be subject to Exchange Act Rules 14a–3 to 14a–6 (other than paragraphs 14a–6(g) and 14a–6(p)), 14a–8, 14a–10, and 14a–12 to 14a–15, provided that:

- The soliciting party does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a shareholder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization;[249]
- Each written communication includes:
- The identity of the nominating shareholder or group and a description of his or her direct or indirect interests, by security holdings or otherwise;
- A prominent legend in clear, plain language advising shareholders that a shareholder nominee is or will be included in the company's proxy statement and to read the company's proxy statement when it becomes available because it includes important information. The legend also must explain to shareholders that they can find the proxy statement, other soliciting material and any other relevant documents, at no charge on the Commission's Web site; and
- Any soliciting material published, sent or given to shareholders in accordance with this paragraph must be filed by the nominating shareholder or group with the Commission, under the company's Exchange Act file number,

[239] *See* 2003 Summary of Comments; *see also* comment letters from CalPERS; CIR; ICI; and Clauss & Wolf.

[240] *See* 2003 Summary of Comments; *see also* comment letters from ABA; NYC Bar; and Sullivan.

[241] *Id.*

[242] The proposed exemption would not apply to solicitations made when seeking to have a nominee included in a company's proxy materials pursuant to a procedure specified in the company's governing documents. In this instance, companies and/or shareholders would have determined the parameters of the shareholder's or group's access to the company's proxy materials. Given the range of possible criteria companies and/or shareholders could establish for nominations, we are not proposing to extend the exemption to those circumstances. A shareholder would need to determine whether one of the existing exemptions applies to their solicitation conducted in connection with a nomination made pursuant to a company's governing documents. The proposed exemption also would not apply to nominations made pursuant to applicable state law provisions, again because state law could establish any number of possible criteria for nominations.

[243] *See* proposed Rule 14a–2(b)(7)(i).

[244] *See id.*

[245] *See* proposed Rule 14a–2(b)(7)(ii). We note that written communications include electronic communications, such as e-mails and Web site postings.

[246] Exchange Act Rule 14a–2(b)(2).

[247] Exchange Act Rule 14a–2(b)(6).

[248] *See* Exchange Act Rule 14a–12.

[249] *See* proposed Rule 14a–2(b)(8)(i).

no later than the date the material is first published, sent or given to shareholders.[250] Three copies of the material would at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the company is listed and registered. The soliciting material would be required to include a cover page in the form set forth in Schedule 14A, with the appropriate box on the cover page marked.[251]

Request for Comment

H.1. Should the Commission provide a new exemption for soliciting activities undertaken by shareholders seeking to form a nominating shareholder group pursuant to Rule 14a–11? If so, is the proposed exemption appropriate? If not, why not? What specific changes to the exemption would be appropriate? Should the rule require that a shareholder meet any of the requirements of Rule 14a–11 to rely on the exemption (*e.g.,* have held the securities they seek to aggregate for the required holding period)? Is it appropriate to require filing with the Commission on the date of first use, as proposed?

H.2. Should the Commission expand the proposed exemption for soliciting activities undertaken by shareholders seeking to form a nominating shareholder group pursuant to Rule 14a–11 to apply also to oral communications? If so, what amendments to the proposed exemption would be necessary?

H.3. What requirements should apply to soliciting activities conducted by a nominating shareholder or group? In particular, what filing requirements and specific parameters should apply to any such solicitations? For example, we have proposed a limited content exemption for certain solicitations by shareholders seeking to form a nominating shareholder group. Is this content-based limitation appropriate? Should shareholders, for example, also be permitted to explain their reasons for forming a nominating shareholder group? Should shareholders be permitted to identify any potential nominee, as proposed, and why that person was chosen? If not, what, if any, limitations would be more appropriate? For example, should an exemption for certain solicitations by shareholders seeking to form a nominating shareholder group be limited to no more than a specified number of shareholders, but not limited in content (*e.g.,* fewer than 10 shareholders, 10 shareholders, 20 shareholders, 30 shareholders, 40 shareholders, more than 40 shareholders)?

H.4. Should communications made to form a group be permitted to identify a possible or proposed nominee or nominees, as proposed?

H.5. Is the requirement that the nominating shareholder or group provide a description of his or her direct or indirect interests, by security holdings or otherwise, sufficiently clear? Do we need to provide additional guidance as to what interests would be required to be disclosed?

H.6. Should all written soliciting materials be filed with the Commission on the date of first use? If not, how much later should they be filed (*e.g.,* two business days after first use; four business days after first use, some other date)? Should the materials be filed before the date of first use?

H.7. Should we provide a similar exemption for soliciting activities undertaken by shareholders seeking to form a nominating shareholder group other than in connection with Rule 14a–11 (*e.g.,* in connection with a nomination under applicable state law provisions or a company's governing documents)?

H.8. Should solicitations by or on behalf of a nominating shareholder or group in support of a nominee included in the company's proxy statement and form of proxy pursuant to Rule 14a–11 be exempt? Why or why not?

H.9. Should the exemption be conditioned on the soliciting materials including a legend about the shareholder's nominee being included in company proxy materials and a statement about where shareholders can find the proxy statement, soliciting material, and other relevant documents, as proposed? Should any other conditions be included in the exemption?

H.10. Should a nominating shareholder or group be required to file any soliciting material published, sent or given to shareholders in accordance with the exemption no later than the date the material is first published, sent or given to shareholders, as proposed?

H.11. Should solicitations by the nominating shareholder or group be limited or prohibited? If so, why?

H.12. Should we provide a similar exemption for soliciting activities undertaken by a nominating shareholder or group in support of their nominee or nominees, where those nominees are included in a company's proxy materials pursuant to applicable state law provisions or a company's governing documents?

C. Amendments to Exchange Act Rule 14a–8(i)(8)

1. Background

Currently, Rule 14a–8(i)(8) allows a company to exclude from its proxy statement a shareholder proposal that relates to a nomination or an election for membership on the company's board of directors or a procedure for such nomination or election. As noted, the Commission amended this provision in 2007 to expressly permit the exclusion of a proposal that would result in an immediate election contest or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders' director nominees in the company's proxy materials for subsequent meetings. The Commission adopted this proposal in December 2007 to provide certainty to companies and shareholders in light of the *AFSCME* decision.[252] In the adopting release, the Commission noted the many disclosures that are required for election contests that would not have been provided for in Rule 14a–8.[253] In this regard, several Commission rules, including Exchange Act Rule 14a–12, regulate contested proxy solicitations to assure that investors receive disclosure to enable them to make informed voting decisions in elections. The requirements to provide these disclosures to shareholders from whom proxy authority is sought are grounded in Rule 14a–3, which requires that any party conducting a proxy solicitation file with the Commission, and furnish to each person solicited, a proxy statement containing the information in Schedule 14A. Items 4(b) and 5(b) of Schedule 14A require numerous specified disclosures if the solicitation is subject to Rule 14a–12(c), and Item 7 of Schedule 14A also requires important specified disclosures for any director nominee. Finally, all of these disclosures are covered by the prohibition on the making of a solicitation containing false or misleading statements or omissions that is found in Rule 14a–9.

The Commission's action in 2007 provided certainty to shareholders and companies regarding the application of Rule 14a–8(i)(8) in the wake of the *AFSCME* decision that had caused confusion about what disclosure and liability rules might apply to any resulting election contest. As noted in

[250] For a registered investment company, the filing would be made under the subject company's Investment Company Act file number.

[251] *See* proposed Rule 14a–2(b)(8)(iii).

[252] *See* Election of Directors Adopting Release. *See also* footnotes 88 and 89, above.

[253] *See* Election of Directors Adopting Release.

Section II., at that time, the Commission did not take any action with respect to the alternative proposal published in 2007.[254] Since that time, we have continued to consider whether the proxy process can be improved and we have concluded that the proxy rules, including Rule 14a–8(i)(8), can be amended to further facilitate shareholders' rights to nominate directors and promote fair corporate suffrage, while still providing appropriate disclosure and liability protections.

2. Proposed Amendment to Rule 14a–8(i)(8)

We are proposing an amendment to Rule 14a–8(i)(8), the election exclusion, to enable shareholders, under certain circumstances, to require companies to include in company proxy materials proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11.[255] The proposal would have to meet the procedural requirements of Rule 14a–8 and not be subject to one of the substantive exclusions other than the election exclusion (*e.g.,* the proposal could be excluded if the shareholder proponent did not meet the ownership threshold under Rule 14a–8).[256]

As proposed, except as provided below in the codification of staff positions, revised Rule 14a–8(i)(8) would not restrict the types of amendments that a shareholder could propose to a company's governing documents to address the company's provisions regarding nomination procedures or disclosures related to shareholder nominations, although any such proposals that conflict with proposed Rule 14a–11 or state law could be excluded.[257] We recognize that the proposed amendments to Rule 14a–8(i)(8) could result in shareholders proposing amendments that would establish procedures for nominating directors and disclosures related to such nominations that require a different ownership threshold, holding period, or other qualifications or representations than those proposed in Rule 14a–11. The amendments proposed by shareholders through Rule 14a–8 would be permitted unless they would conflict with Rule 14a–11 (*i.e.,* proposals that would preclude nominations by shareholders who would qualify under proposed Rule 14a–11 to have their nominee for director included in the company's proxy materials) or applicable state law. We considered whether this would create confusion or lack of certainty for companies and their shareholders, but believe that this possibility is outweighed by the importance of facilitating shareholders' ability to exercise their rights to determine their own additional shareholder nomination proxy disclosure and related procedures.

3. Disclosure Requirements

We are not proposing any new disclosure requirements for a shareholder that submits a proposal that would amend, or that requests an amendment to, a company's governing documents to address the company's nomination procedures or procedures for inclusion of shareholder nominees in company proxy materials or disclosures related to those shareholder provisions.[258] New disclosures would not be required from a shareholder simply submitting such a proposal to amend, or requesting an amendment to, a company's governing documents because the Commission believes that a shareholder may simply want to amend the company's procedures for nominating directors, but may not intend to nominate any particular individual.[259]

As noted, the proposed amendments to Rule 14a–8(i)(8) could result in shareholders proposing amendments that would establish procedures for nominating directors and disclosures related to such nominations that require a different ownership threshold, holding period, or other qualifications or representations than those proposed in Rule 14a–11. In addition, a state could set forth in its corporate code[260] or a company may choose to amend its governing documents, to provide for nomination or disclosure rights in addition to those provided pursuant to Rule 14a–11 (*e.g.*, a company could choose to provide a right for shareholders to have their nominees disclosed in the company's proxy materials regardless of ownership—in that instance, the company's provision would apply for certain shareholders who would not otherwise have their nominees included in the company's proxy materials pursuant to Rule 14a–11). Accordingly, we are proposing amendments to our proxy rules to address the disclosure requirements when a nomination is made pursuant to such a provision.[261] We believe the proposed additional disclosure requirements are necessary to provide shareholders with full and fair disclosure of information that is material when a choice among directors to be elected is presented.

Proposed Rule 14a–19 would apply to a shareholder nomination for director for inclusion in the company's proxy materials made pursuant to procedures

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[254] Under the alternative proposal, Rule 14a–8(i)(8) would have been amended with certain conditions to permit a qualifying shareholder who makes full disclosure in connection with a bylaw proposal relating to director nominations procedures to have that proposal included in a company's proxy materials.

[255] A proposal would continue to be subject to exclusion under Rule 14a–8(i)(2) if its implementation would cause the company to violate any state, federal, or foreign law to which it is subject, or under Rule 14a–8(i)(3), if the proposal or supporting statement was contrary to any of the Commission's proxy rules. As proposed to be amended, Rule 14a–8(i)(8) would allow shareholders to propose additional means, other than Rule 14a–11, for disclosure of shareholder nominees in company proxy materials. Therefore, a shareholder proposal that seeks to provide an additional means for including shareholder nominees in the company's proxy materials pursuant to the company's governing documents would not be deemed to conflict with Rule 14a–11 simply because it would establish different eligibility thresholds or require more extensive disclosures about a nominee or nominating shareholder than would be required under Rule 14a–11. A shareholder proposal would conflict with Rule 14a–11, however, to the extent that the proposal would purport to prevent a shareholder or shareholder group that met the requirements of proposed Rule 14a–11 from having their nominee for director included in the company's proxy materials. A shareholder proposal would also be subject to exclusion under Rule 14a–8(i)(2) or Rule 14a–8(i)(3) to the extent that it would affirmatively excuse nominating shareholders or their nominees from compliance with the liability provisions of Rule 14a–9(c) or the proposed Rule 14a–19 disclosure requirements applicable to shareholder nominations submitted pursuant to an applicable state law provision or a company's governing documents.

[256] Currently, Rule 14a–8 requires that a shareholder proponent have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for a period of one year prior to submitting the proposal. *See* Rule 14a–8(b). These requirements would remain the same. The proposal may be subject to exclusion if the procedural requirements of the rule are not met or it falls within one of the other substantive bases for exclusion included in Rule 14a–8.

[257] In this regard, the proposed revision to Rule 14a–8(i)(8) would not make a distinction between binding and non-binding proposals.

[258] Shareholders submitting a proposal to amend a company's governing documents to address nomination procedures for inclusion of shareholder nominees in company proxy materials or disclosures related those shareholder nomination provisions would be subject to the rule's current requirements. *See* footnote 256, above.

[259] This approach is different from the disclosure requirements the Commission proposed in the Shareholder Proposals Release in 2007; however, it is consistent with the overall requirements relating to the submission of shareholder proposals—generally, shareholder proponents are not required to provide any type of disclosure along with their proposal.

[260] *See* discussion of North Dakota Publicly Traded Corporations Act, N.D. Cent. Code § 10–35 et al., in footnote 70, above.

[261] *See* proposed Rule 14a–19.

established pursuant to state law or by a company's governing documents. The proposed rule would require a nominating shareholder or group to include in its shareholder notice on Schedule 14N (which also would be filed with the Commission on the date provided to the company) disclosures about the nominating shareholder or group and their nominee that are similar to what would be required in an election contest.[262]

Specifically, the shareholder notice on Schedule 14N would be required to include:

- A statement from the nominee that the nominee consents to be named in the company's proxy statement and to serve on the board if elected, for inclusion in the company's proxy statement; [263]
- Disclosure about the nominee complying with the requirements of Item 4(b), Item 5(b), and Items 7(a), (b) and (c) and, for investment companies, Item 22(b) of Exchange Act Schedule 14A, for inclusion in the company's proxy statement; [264]
- Disclosure about the nominating shareholder or members of a nominating shareholder group consistent with the disclosure currently required pursuant to Item 4(b) and Item 5(b) of Schedule 14A; [265]
- Disclosure about whether the nominating shareholder or member of a nominating shareholder group has been involved in any legal proceeding during the past five years, as specified in Item 401(f) of Regulation S–K. Disclosure pursuant to this section need not be provided if provided in response to Items 4(b) and 5(b) of Schedule 14A; [266]
- The following disclosure regarding the nature and extent of the relationships between the nominating shareholder or group and nominee and the company or any affiliate of the company:
- Any material direct or indirect interest in any contract or agreement between the nominating shareholder or group or the nominee and the company or any affiliate of the company (including any employment agreement, collective bargaining agreement, or consulting agreement);
- Any material pending or threatened litigation in which the nominating shareholder or group or nominee is a party or a material participant, and that involves the company, any of its officers or directors, or any affiliate of the company; and
- Any other material relationship between the nominating shareholder or group or the nominee and the company or any affiliate of the company not otherwise disclosed; [267] and
- Disclosure of any Web site address on which the nominating shareholder or group may publish soliciting materials.[268]

These disclosures would then be included in the company's proxy materials pursuant to proposed new Item 7(f) of Schedule 14A. Proposed Item 22(b)(19) of Schedule 14A would require investment companies to include in their proxy materials disclosures from the nominating shareholder or shareholder group with regard to the nominee and nominating shareholder or shareholder group that are similar to those required for reporting companies (other than registered investment companies).

In addition, the nominating shareholder or group would be required to identify the shareholder or group making the nomination and the amount of their ownership in the company on Schedule 14N. The filing would be required to include, among other disclosures:

- The name and address of the nominating shareholder or each member of the nominating shareholder group; and
- Information regarding the aggregate number and percentage of the securities entitled to be voted, including the amount beneficially owned and the number of shares over which the nominating shareholder or each member of the nominating shareholder group has or shares voting or disposition power.

We believe that these disclosures would assist shareholders in making an informed voting decision with regard to any nominee or nominees put forth by the nominating shareholder or group, in that the disclosures would enable shareholders to gauge the nominating shareholder's or group's interest in the company. Depending on the requirements of the state law provisions or the company's governing documents, these disclosures also may be important to the company in determining whether the nominating shareholder or group meets any ownership threshold, where applicable. The nominating shareholder or group would be liable for any false or misleading statements in these disclosures pursuant to proposed new paragraph (c) of Rule 14a–9.[269]

The disclosure requirements we are proposing differ from the approach proposed in the alternative proposal in 2007.[270] In that release, the Commission proposed requiring significant new disclosures from shareholder proponents of bylaw proposals to be made on Schedule 13G. Commenters expressed concern that the proposed disclosure requirements were too onerous and should not be required to submit a shareholder proposal.[271] Upon further consideration, we believe that it is appropriate to allow the submission of proposals to amend, or that request an amendment to, a company's governing documents to address the company's nomination procedures or disclosures related to shareholder nominations without requiring extensive disclosure regarding the shareholder proponent. As noted above, we acknowledge that some shareholders may simply desire to amend or establish the company's procedure for nominating directors, but may not contemplate nominating any particular

[262] *See* proposed Rule 14a–19.

[263] *See* proposed Rule 14a–19(a).

[264] *See* proposed Rule 14a–19(b). This information would identify the nominee, describe certain legal proceedings, if any, related to the nominee, and describe certain of the nominee's transactions and relationships with the company. *See* Items 7(a), (b), and (c) of Schedule 14A. This information also would include biographical information and information concerning interests of the nominee. *See* Item 5(b) of Schedule 14A. With respect to a nominee for director of an investment company, the disclosure would include certain basic information about the nominee and any arrangement or understanding between the nominee and any other person pursuant to which he was selected as a nominee; information about the positions, interests, and transactions and relationships of the nominee and his immediate family members with the company and persons related to the company; information about the amount of equity securities of funds in a fund complex owned by the nominee; and information describing certain legal proceedings related to the nominee, including legal proceedings in which the nominee is a party adverse to, or has a material interest adverse to, the company or any of its affiliated persons. *See* paragraph (b) of Item 22 of Schedule 14A.

[265] *See* proposed Rule 14a–19(c).

[266] *See* proposed Rule 14a–19(d).

[267] *See* proposed Rule 14a–19(e).

[268] *See* proposed Rule 14a–19(f).

[269] *See* proposed Rule 14a–9(c).

[270] *See* Shareholder Proposals Proposing Release.

[271] *See*, *e.g.*, comment letters from American Federation of Labor and Congress of Industrial Organizations (August 2, 2007) (''AFL–CIO 2007''); Amalgamated Bank LongView Funds (October 2, 2007); Australian Council of Super-Investors (October 2, 2007); Robert Balopole, CFA, President, Balopole Investment Management Corp.; CalPERS 2007; California State Teachers' Retirement System (November 16, 2007) (''CalSTERS 2007''); Council of Institutional Investors (September 18, 2007) (''CII''); Public Employees' Retirement Association of Colorado (October 1, 2007) (''CO Retirement''); McRitchie 2007; F&C Management Limited (October 1, 2007); State Board of Administration of Florida (October 3, 2007); ICGN Shareholder Rights Committee (October 2, 2007); State Universities Retirement System of Illinois (October 1, 2007); Investment Management Association (October 2, 2007); KLD Research & Analytics, Inc. (October 2, 2007); Brett McDonnell (September 27, 2007); Treasurer, State of North Carolina (October 2, 2007); Ohio Public Employees Retirement System (October 2, 2007); SEIU; International Brotherhood of Teamsters (August 30, 2007); UK Local Authority Pension Fund Forum (October 2, 2007); and United Church Foundation (September 27, 2007).

individual. In addition, we do not require additional disclosure from proponents of other types of shareholder proposals submitted under Rule 14a–8. We are soliciting comment, however, on whether additional disclosure from a shareholder submitting a bylaw proposal would be appropriate.

4. Codification of Prior Staff Interpretations

Although we are proposing to amend Rule 14a–8(i)(8), we continue to believe that under certain circumstances companies should have the right to exclude proposals related to particular elections and nominations for director from company proxy materials where those proposals could result in an election contest between company and shareholder nominees without the important protections provided by the disclosure and liability provisions otherwise provided for in the proxy rules. Rule 14a–8(i)(8) should not, however, be read so broadly such that the provision could be used to permit the exclusion of proposals regarding the qualifications of directors, shareholder voting procedures, board nomination procedures and other election matters of importance to shareholders that would not directly result in an election contest between management and shareholder nominees, and that do not present significant conflicts with the Commission's other proxy rules. Therefore, we propose to amend Rule 14a–8(i)(8) to codify certain prior staff interpretations with respect to the type of proposals that would continue to be excludable.[272]

A company would be permitted to exclude a proposal under Rule 14a–8(i)(8) if it:

- Would disqualify a nominee who is standing for election; [273]
- Would remove a director from office before his or her term expired; [274]
- Questions the competence, business judgment, or character of one or more nominees or directors; [275]
- Nominates a specific individual for election to the board of directors,[276] other than pursuant to Rule 14a–11, an applicable state law provision, or a company's governing documents; or
- Otherwise could affect the outcome of the upcoming election of directors.

With regard to the language ''otherwise could affect the outcome of the upcoming election of directors,'' we are seeking to address the fact that the proposed new language of the exclusion specifically addresses the particular types of proposals that we have traditionally seen in this area and that we believe are clearly excludable under the policy underlying the rule. With the broader proposed language, we are seeking to address new proposals that may be developed over time that are comparable to the four specified categories and would undermine the purpose of the exclusion. This broader language is generally consistent with the language of the other bases for exclusion in Rule 14a–8.[277]

Request for Comment

I.1. Should the Commission amend Rule 14a–8(i)(8), as proposed, to allow proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11? Should the rule instead require such proposals to be included only in particular circumstances? For example, should inclusion of such proposals be required only when a company already has a provision in place regarding the inclusion of shareholder director nominees, or disclosure about those nominees, in company proxy materials?

I.2. Should the Commission amend Rule 14a–8(i)(8) to allow proposals that would amend, or that request an amendment to, a company's governing documents to provide for or prohibit inclusion of shareholder nominees for director in company proxy materials? Should such an amendment operate separately from proposed Rule 14a–11? Should such an amendment be adopted regardless of whether proposed Rule 14a–11 is adopted? If so, under what circumstances should such proposals be permitted? For example, should shareholder proposals be included where they propose or request amendments to provisions in the company's governing documents to address the inclusion of shareholder nominees for director in the company's proxy materials so long as such amendments are not prohibited under state law? Should such proposals instead be included only if the law of the company's state of incorporation explicitly authorizes a company to have a provision in its governing documents that permits the inclusion of shareholder nominees in the company's proxy materials? Should such proposals instead be limited under Rule 14a–8 to instances when a company already has a provision in its governing documents that addresses the inclusion of shareholder nominees in the company's proxy materials?

I.3. Should companies be required to include non-binding proposals regarding procedures to include shareholder nominees for director in company proxy materials, as proposed? Should the requirements instead be limited to binding proposals?

I.4. Should proposed Rule 14a–8(i)(8) operate independently, even if proposed Rule 14a–11 were not adopted or not in effect? Why or why not? Are there changes or additions to Rule 14a–8(i)(8) as proposed that can or should be made so that it would be better suited or able to operate independently? Please give specific recommendations.

I.5. Is it sufficiently clear that shareholders would have the ability under proposed Rule 14a–8(i)(8) to propose nomination procedures that are different from proposed Rule 14a–11 provided that such procedures would serve as additional methods of accessing the proxy and would not preclude a shareholder or group or shareholders who satisfied the Rule 14a–11 requirements from using the Rule 14a–11 method? If not, what clarification should be made?

I.6. As proposed, a shareholder proposal under Rule 14a–8(i)(8) would supplement proposed Rule 14a–11, not replace it. Should shareholders instead be permitted under Rule 14a–8(i)(8) to propose governing document amendments that would conflict with proposed Rule 14a–11? Please explain how and why. Are there different

[272] In limited circumstances, the staff may permit proponents to make minor revisions to a proposal to cure a deficiency under Rule 14a–8. Under existing staff interpretations, the staff may permit revisions to proposals that would disqualify board nominees from standing for election at the upcoming meeting or that would remove a director from office before his or her term expires. In contrast, where the proposal or supporting statement questions the competence or business judgment of one or more directors that will stand for reelection at the upcoming meeting, the staff will generally not permit the proponent to revise the proposal to cure such a deficiency. The proposed codification of existing staff interpretations under Rule 14a–8(i)(8) is not intended to alter the staff's historical approach (*see* Staff Legal Bulletin No. 14 (July 13, 2001)) to permitting revisions to cure deficiencies under Rule 14a–8(i)(8).

[273] *See, e.g., Dollar Tree Stores, Inc.* (March 7, 2008) and *Waddell and Reed Financial, Inc.* (February 23, 2001).

[274] *See, e.g., TVI Corporation* (April 2, 2008) and *First Energy Corp.* (March 17, 2003).

[275] *See, e.g., Exxon Mobil Corporation* (March 20, 2002) and *AT&T Corp.* (February 12, 2001).

[276] *See, e.g., N–Viro International Corporation* (March 8, 2007) and *Dow Jones & Company, Inc.* (January 31, 1996).

[277] *See, e.g.*, Rule 14a–8(i)(7) addressing proposals that ''deal[] with a matter relating to the company's ordinary business operations,'' and Rule 14a–8(i)(10) addressing proposals that have been ''substantially implemented'' already by the company.

limitations on such proposals that we should consider? If so, what are they?

I.7. What would be the costs to companies if Rule 14a–8(i)(8) were amended as proposed?

I.8. Rule 14a–8 currently requires that a shareholder proponent have held continuously at least $2,000 in market value or 1% of the company's securities entitled to be voted on the proposal at the meeting for at least one year as of the date of submission of the proposal. Are these thresholds appropriate? Should the minimum ownership threshold be higher than $2,000 in market value of the company's securities entitled to be voted on the proposal? Should the minimum ownership threshold be periodically adjusted for inflation? Should these eligibility determinations be made on the date of submission of the proposal, as proposed? If not, what date should be used?

I.9. Are there alternative thresholds that would be more appropriate for purposes of submitting a proposal under Rule 14a–8(i)(8) (*e.g.*, 1%, 2%, 3%, 4%, or 5% of the company's securities)? If so, please explain.

I.10. We are not proposing any requirements to disclose information about a shareholder proponent who submits a proposal that seeks to establish a procedure for nominating one or more directors. Should the rule require disclosure about a shareholder proponent who submits a proposal that relates to procedures for nominating directors but does not nominate a director? If so, what disclosures would be appropriate? The disclosures required in a contested election? Disclosure about the proponent's motives and interactions with the company leading up to the proposal? With respect to requiring disclosure from shareholder proponents, should our rules make a distinction between a proposal relating to a procedure for nominating directors and other proposals on other unrelated subjects?

I.11. Should disclosure consistent with that required in an election contest as defined in Rule 14a–12 be required for shareholder nominations pursuant to applicable state law provisions or a company's governing documents, as proposed? Why or why not? What additional disclosures should be required, if any? Which of the proposed disclosure requirements, if any, should be deleted or revised?

I.12. As proposed, the disclosures required for a nomination pursuant to an applicable state law provision or a company's governing documents do not include all of the disclosures that would be required for a Rule 14a–11 nomination. Would any of the additional disclosures required under Rule 14a–11 be appropriate with regard to a nomination under an applicable state law provision or a company's governing documents? If so, which ones in particular? Should a nominating shareholder or group submitting a nomination pursuant to an applicable state law provision or a company's governing documents be required to provide a statement regarding the nominating shareholder's or group's intent to continue to hold the securities through the date of the meeting? Should the rules require a statement regarding the nominating shareholder's or group's intent with respect to continued ownership of the shares after the election?

I.13. Should Rule 14a–8(i)(8) be amended to codify the prior staff interpretations of the election exclusion, as proposed? Why or why not? Does the proposed new language best describe the category of proposals that companies should be permitted to exclude? Are there other examples or categories or proposals that should be included in the revised rule (that do not restrict the ability of shareholders to propose nomination procedures)?

I.14. Is the proposed new language of Rule 14a–8(i)(8) sufficiently clear? In particular, would the proposed language ''or otherwise could affect the outcome of the upcoming election of directors,'' achieve its goal? Would there be unintended consequences of revising the language as proposed?

D. Other Rule Changes

1. Beneficial Ownership Reporting Requirements

The proposed rules would enable shareholders to engage in limited solicitations to form nominating shareholder groups and engage in solicitations in support of their nominees without disseminating a proxy statement. Although the minimum amount of securities a shareholder or group of shareholders must beneficially hold to be eligible to submit a nomination pursuant to proposed Rule 14a–11 is 1% for large accelerated filers, 3% for accelerated filers, and 5% for non-accelerated filers, the Commission anticipates that some shareholders or groups of shareholders may beneficially own in the aggregate more than 5% of the company's securities that are eligible to vote for the election of directors. Therefore, nominating shareholders will need to consider whether they have formed a group under Exchange Act Section 13(d)(3) and Rule 13d–5(b)(1) that is required to file beneficial ownership reports.[278] Any person who is directly or indirectly the beneficial owner of more than 5% of a class of equity securities registered under Exchange Act Section 12 must report that ownership by filing an Exchange Act Schedule 13D with the Commission.[279] There are exceptions to this requirement, however, that permit such a person to report that ownership on Schedule 13G rather than Schedule 13D.[280] One exception permits filings on Schedule 13G for a specified list of qualified institutional investors who have acquired the securities in the ordinary course of their business and with neither the purpose nor the effect of changing or influencing control of the company. A second exception applies to persons who are not specified in the first exception. These beneficial owners of more than 5% of a subject class of securities may file on Schedule 13G if they acquired the securities with neither the purpose nor the effect of changing or influencing control of the company and they are not directly or indirectly the beneficial owner of 20% or more of the subject class of securities.

Central to Schedule 13G eligibility is that the shareholder be a passive investor that has acquired the securities without the purpose, or the effect, of changing or influencing control of the company. In addition, shareholders who are filing as qualified institutional investors must have acquired the securities in the ordinary course of their business. We believe that the formation of a shareholder group solely for the purpose of nominating one or more directors pursuant to proposed Rule 14a–11, the nomination of one or more directors pursuant to proposed Rule 14a–11, soliciting activities in connection with such a nomination (including soliciting in opposition to a company's nominees), or the election of such a nominee as a director under proposed Rule 14a–11, should not result in a nominating shareholder or nominating shareholder group losing its eligibility to file on Schedule 13G. In such circumstances, a nominating shareholder or nominating shareholder group could report on Schedule 13G, rather than Schedule 13D. Accordingly, we are proposing to revise the requirement that the first and second

[278] Nominating shareholders that have formed a group under Exchange Act Section 13(d)(3) and Rule 13d–5(b) would need to reassess whether group status and the obligation of the group to file beneficial ownership reports continue after the election of directors.

[279] *See* Exchange Act Rule 13d–1.

[280] *See, e.g.,* Exchange Act Rules 13d–1(b) and 13d–1(c).

categories of persons who may report their ownership on Schedule 13G have acquired the securities without the purpose or effect of changing or influencing control of the registrant to provide an exception for activities solely in connection with a nomination under Rule 14a–11.[281] Any activity other than those provided for under Rule 14a–11 would make these instructions inapplicable. These rule changes would not apply to nominating shareholders or groups that submit a nomination pursuant to an applicable state law provision or a company's governing documents because in those instances the applicable provisions may not limit the number of board seats for which a shareholder or group could nominate candidates or include a requirement that the nominating shareholder or group lack intent to change the control of the issuer or to gain more than a limited number of seats on the board (as is the case under proposed Rule 14a–11). Accordingly, we do not believe it would be appropriate to make any determination as to whether a nominating shareholder or group under an applicable state law provision or a company's governing documents would be eligible to file on Schedule 13G.

Request for Comment

J.1. The proposal would provide that a shareholder or shareholder group[282] would not, solely by virtue of nominating one or more directors under proposed Rule 14a–11, soliciting on behalf of that nominee or nominees, or having that nominee or nominees elected, lose their eligibility to file as a passive or qualified institutional investor. This provision would then permit those shareholders or groups to report their ownership on Schedule 13G, rather than Schedule 13D. Is this approach appropriate? Should other conditions be required to be satisfied? If so, what other conditions? For example, should a nominating shareholder or group cease to qualify as a passive or qualified institutional investor where the nominee is the nominating shareholder or a member of the group, a member of the immediate family of the nominating shareholder or any member of the group, an employee of the nominating shareholder or any member of the group, or is in any way controlled by the nominating shareholder or any member of the group?

J.2. Should nominating shareholders or groups be required to comply with the additional Schedule 13D filing and disclosure requirements under the Exchange Act beneficial ownership reporting standards?

J.3. Should we provide a similar provision for nominating shareholders or groups submitting a nomination pursuant to an applicable state law provision or a company's governing documents? Why or why not?

2. Exchange Act Section 16

Exchange Act Section 16[283] applies to every person who is the beneficial owner of more than 10% of any class of equity security registered under Exchange Act Section 12 (''10% owners''), and each officer and director (collectively with 10% owners, ''insiders'') of the issuer of such security. Generally:

- Section 16(a) requires an insider to file an initial report with the Commission disclosing his or her beneficial ownership of all equity securities of the issuer upon becoming an insider. To keep this information current, Section 16(a) also requires insiders to report changes in such holdings, in most cases within two business days following the transaction.[284]
- Section 16(b) provides the issuer (or shareholders suing on behalf of the issuer) a private right of action to recover from an insider any profit realized by the insider from any purchase and sale (or sale and purchase) of any equity security of the issuer within any period of less than six months.[285]
- Section 16(c) makes it unlawful for an insider to sell any equity security of the issuer if the insider: (1) Does not own the security sold; or (2) owns the security, but does not deliver it against the sale within specified time periods.[286]

In 2003 the Commission proposed that a group formed solely for the purpose of nominating a director pursuant to proposed Rule 14a–11, soliciting in connection with the election of that nominee, or having that nominee elected as a director should not be viewed as being aggregated together for purposes of the 10% ownership determination under Section 16.[287] We are not proposing such an exclusion today and instead believe it would be appropriate to apply the existing analysis of whether a group has formed[288] and whether Section 16 applies.[289] In this regard, because the ownership thresholds for proposed Rule 14a–11 are significantly lower than 10%, and are generally lower than what was proposed in 2003, we do not believe that the lack of an exclusion would have a deterrent effect on the formation of groups, and therefore an exclusion may be unnecessary under the current proposal. Rather, a group formed for the purpose of nominating a director pursuant to proposed Rule 14a–11, soliciting in connection with the election of that nominee, or having that nominee elected as a director, would be analyzed the same way as any other group for purposes of determining whether group members are 10% owners subject to Section 16.

Some shareholders, particularly institutions and other entities, may be concerned that successful use of proposed Rule 14a–11 to include a director nominee in company proxy materials may result in the nominating person also being deemed a director under the ''deputization'' theory developed by courts in Section 16(b) short-swing profit recovery cases.[290] Under this theory it is possible for a person to be deemed a director subject to Section 16, even though the issuer has not formally elected or otherwise named that person a director. We have not proposed standards for establishing the independence of the nominee from the nominating shareholder, or members of the nominating shareholder group.

[281] This exception would only be available for purposes of the nomination. After the election of directors, a nominating shareholder or group would need to reassess its eligibility to continue to report on Schedule 13G as a passive or qualified institutional investor. For example, if a nominating shareholder is the nominee, and is successful in being elected to the board of a company, the shareholder would most likely be ineligible to continue filing on Schedule 13G because of its ability as a director to directly or indirectly influence the management and policies of the company.

[282] A group may file on Schedule 13G so long as each member qualifies to do so individually.

[283] 15 U.S.C. 78p.

[284] Exchange Act Section 16(a) [15 U.S.C. 78p(a)].

[285] Exchange Act Section 16(b) [15 U.S.C. 78p(b)].

[286] Exchange Act Section 16(c) [15 U.S.C. 78p(c)].

[287] Commenters on the 2003 Proposal generally supported the proposed exception. *See* 2003 Summary of Comments; *see also* comment letters from CalPERS, CIR; ICI; NYC Bar; and NYS Bar.

[288] *See* Exchange Act Rule 13d–5(b) [17 CFR 240.13d–5(b)].

[289] *See* Exchange Act Rule 16a–1(a)(1) [17 CFR 240.16a–1(a)(1)].

[290] *See Feder* v. *Martin Marietta,* 406 F.2d 260 (2d Cir.), cert. denied, 396 U.S. 1036 (1970); *Blau* v. *Lehman,* 368 U.S. 403 (1962); and *Rattner* v. *Lehman,* 193 F.2d 564 (2d Cir. 1952). The judicial decisions in which this theory was applied do not establish precise standards for determining when ''deputization'' may exist. However, the express purpose of Section 16(b) is to prevent the unfair use of information by insiders through their relationships to the issuer. Accordingly, one factor that courts may consider in determining if Section 16(b) liability applies is whether, by virtue of the ''deputization'' relationship, the ''deputizing'' entity's transactions in issuer securities may benefit from the deputized director's access to inside information.

Request for Comment

K.1. Would it be a disincentive to using proposed Rule 14a–11 if shareholders forming a group to nominate a director could become subject to Section 16 once the group's ownership exceeds 10% of the company's equity securities? Why or why not?

K.2. Are there any specific reasons why shareholders forming a group solely to nominate a director pursuant to proposed Rule 14a–11 should not be subject to Section 16 once the group's ownership exceeds 10% of the company's equity securities? If so, should the Commission adopt an exclusion from Section 16? Why, or why not?

K.3. If we should amend Rule 16a–1(a)(1), the rule that defines who is a 10% owner for Exchange Act Section 16 purposes, to exclude a Rule 14a–11 nominating shareholder group from the definition, how should such an exclusion be structured? For example, these groups could remain subject to the general condition of the rule that they not have the purpose or effect of changing or influencing control of the issuer, but a note to Rule 16a–1(a)(1) could provide an exception for members of nominating shareholder groups formed solely for the purpose of using proposed Rule 14a–11.[291] Should these conditions or other conditions apply?

K.4. Should the Commission consider providing an exclusion to the existing Rule 13d–5 definition of ''group'' that applies to both the Section 13(d) beneficial ownership reporting requirements and the Section 16 reporting requirements?

K.5. If the Commission adopts any such exclusion, should it be based on additional or different conditions? For example, should the Commission provide an exclusion from the definition of ''group'' in Rule 13d–5(b) for shareholders that agree to act together solely for the purpose of holding their securities in accordance with proposed Rule 14a–11(b)(2)?

K.6. Are there reasons that members of nominating shareholder groups formed under proposed Rule 14a–11 should be treated differently than shareholder groups permitted to form and formed to nominate directors under an applicable state law provision, or under provisions in a company's governing documents? If so, why? What distinctions ought to be drawn between groups formed under proposed Rule 14a–11 and an applicable state law provision or a company's governing documents in terms of Rule 13d–5(b) and Rule 16a–1(a)(1)?

K.7. Should there be a prohibition on any affiliation between nominees and nominating shareholders or groups? If so, what limitations would be appropriate? Would any such prohibitions or limitations make it less likely that in Section 16(b) cases courts would find nominating shareholders to be ''deputized'' directors in circumstances where liability should not apply? Would the lack of any such prohibitions or limitations increase the likelihood that courts would find nominating shareholders to be ''deputized'' directors?

E. Application of the Liability Provisions in the Federal Securities Laws to Statements Made by a Nominating Shareholder or Nominating Shareholder Group

It is our intent that a nominating shareholder or group relying on Rule 14a–11, an applicable state law provision, or a company's governing documents to include a nominee in company proxy materials be liable for any materially false or misleading statements in information provided by the nominating shareholder or group to the company (in its shareholder notice on Schedule 14N) that is then included in the company's proxy materials. To this end we have amended Rule 14a–9 to add a new paragraph (c), to specifically address these situations. Proposed new paragraph (c) states that ''no nominee, nominating shareholder or nominating shareholder group, or any member thereof, shall cause to be included in a registrant's proxy materials, either pursuant to the federal proxy rules, an applicable state law provision, or a registrant's governing documents as they relate to including shareholder nominees for director in registrant proxy materials, any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.''

In addition, proposed new Rule 14a–11(e) contains express language providing that the company would not be responsible for information that is provided by the nominating shareholder or group under Rule 14a–11 and then repeated by the company in its proxy statement, except where the company knows or has reason to know that the information is false or misleading. A similar provision is included in proposed Rule 14a–19 with regard to information that is provided by the nominating shareholder or group in connection with a nomination made pursuant to an applicable state law provision or the company's governing documents.[292]

Also, as proposed, any information that is provided to the company in the notice from the nominating shareholder or group under Rule 14a–11 (and, as required, filed with the Commission by the nominating shareholder or group) and then included in the company's proxy materials would not be incorporated by reference into any filing under the Securities Act, the Exchange Act, or the Investment Company Act unless the company determines to incorporate that information by reference specifically into that filing.[293] A similar provision would apply to information that is provided by the nominating shareholder or group in connection with a nomination made pursuant to an applicable state law provision or the company's governing documents.[294]

To the extent the company does incorporate that information by reference or otherwise adopt the information as its own, however, we would consider the company's disclosure of that information as the company's own statement for purposes of the antifraud and civil liability provisions of the Securities Act, the Exchange Act, or the Investment Company Act, as applicable.

Request for Comment

L.1. Is an amendment to Rule 14a–9 the appropriate means to assign liability for materially false or misleading information provided by the nominating shareholder or group to the company that is included in the company's proxy materials? If not, what would be a more appropriate means? Should we characterize the disclosure provided to the company by the nominating shareholder or group and included in the company's proxy materials as soliciting material of the nominating

[291] Rule 16a–1(a)(1) also contains a general condition that the securities be held for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business, but this condition would not be applicable to nominating shareholder groups under the exclusion contemplated by this comment request.

[292] *See* Note to proposed Rule 14a–19.

[293] *See* the Instruction to proposed Item 7(e) of Schedule 14A; Instruction to proposed Item 22(b)(18) of Schedule 14A.

[294] *See* the Instruction to proposed Item 7(f) of Schedule 14A; Instruction to proposed Item 22(b)(19) of Schedule 14A.

shareholder or group, as we proposed in 2003? Why or why not? Is it appropriate for proposed Rule 14a–9(c) to apply to nominations made pursuant to Rule 14a–11, an applicable state law provision, and a company's governing documents?

L.2. Does the language of proposed new paragraph (c) of Rule 14a–9 make clear that the nominating shareholder or group would be liable for any information included in its Schedule 14N or notice to the company that is included in the company's proxy materials? If not, what specific changes should be made to the proposed rule text?

L.3. Does the proposal make clear the company's responsibilities when it includes such information in its proxy materials? Should the proposal include language otherwise addressing a company's responsibility for repeating statements that it knows or has reason to know are not accurate? Are there situations where a company should be responsible for repeating statements of the nominating shareholder or group? Should the proposal treat disclosure provided in connection with a nomination pursuant to Rule 14a–11, an applicable state law provision, or a company's governing documents differently?

L.4. Should information provided by nominating shareholders or groups be deemed incorporated by reference into Securities Act, Exchange Act, or Investment Company Act filings? Why or why not?

L.5. Should information, if incorporated by reference into Securities Act or Exchange Act filings, still be treated as the responsibility of the nominee rather than the company? As proposed, are we creating a disincentive to incorporation by reference?

F. General Request for Comment

We request and encourage any interested person to submit comments regarding:

- The proposed amendments that are the subject of this release;
- Additional or different changes; or
- Other matters that may have an effect on the proposals contained in this release.

We request comment from the point of view of companies, investors and other market participants. With regard to any comments, we note that such comments are of great assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

IV. Paperwork Reduction Act

A. Background

The proposed amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995.[295] We are submitting the proposal to the Office of Management and Budget for review in accordance with the PRA.[296] The titles for the collections of information are:

(1) ''Form ID'' (OMB Control No. 3235–0328);

(2) ''Proxy Statements—Regulation 14A (Commission Rules 14a–1 through 14a–19 and Schedule 14A)'' (OMB Control No. 3235–0059);

(3) ''Information Statements—Regulation 14C (Commission Rules 14c–1 through 14c–7 and Schedule 14C)'' [297] (OMB Control No. 3235–0057);

(4) ''Schedule 14N'';

(5) ''Securities Ownership—Regulation 13D and 13G (Commission Rules 13d–1 through 13d–7 and Schedules 13D and 13G)'' (OMB Control No. 3235–0145);

(6) ''Form 8–K'' (OMB Control No. 3235–0060); and

(7) ''Rule 20a–1 under the Investment Company Act of 1940, Solicitations of Proxies, Consents, and Authorizations'' (OMB Control No. 3235–0158).

These regulations, rules and forms were adopted pursuant to the Exchange Act and the Investment Company Act and set forth the disclosure requirements for securities ownership reports filed by investors, proxy and information statements,[298] and current reports filed by companies to ensure that investors are informed and can make informed voting or investing decisions. The hours and costs associated with preparing, filing, and sending these schedules and forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

B. Summary of Proposed Amendments

The Commission's proposals would provide shareholders with two ways to more fully exercise their rights to nominate directors. First, we are proposing a new rule—Rule 14a–11—that would, under certain circumstances, require companies to include in their proxy materials shareholder nominees for director submitted by long-term shareholders or groups of shareholders with significant holdings. Under the rule, a company would not be required to include a shareholder nominee or nominees for director in the company proxy materials where the nominating shareholder or group is seeking to change the control of the issuer or to obtain more than a limited number of seats on the board. Proposed Rule 14a–11 would not apply where state law or a company's governing documents prohibit shareholders from nominating directors.

For purposes of the PRA, we estimate the total annual incremental paperwork burden resulting from proposed Rule 14a–11 and the related rule changes for reporting companies (other than registered investment companies), and registered investment companies to be approximately 17,149 hours of internal company or shareholder time and a cost of approximately $2,796,320 for the services of outside professionals.[299] For purposes of the PRA, we estimate the total annual incremental paperwork burden to nominating shareholders and groups from proposed Schedule 14N to be approximately 28,565 hours of shareholder personnel time, and $3,808,600 for services of outside professionals. As discussed further, below, these total costs include all additional disclosure burdens associated with the proposed rules including burdens related to the notice and disclosure requirements.

Second, under the proposed amendment to Rule 14a–8(i)(8), the ''election exclusion,'' a company would

[295] 44 U.S.C. 3501 *et seq.*

[296] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[297] Exchange Act Schedule 14C requires disclosure of some items of Exchange Act Schedule 14A. Therefore, while we are not proposing to amend the text of Schedule 14C, the proposed amendments to Schedule 14A also must be reflected in the PRA burdens for Schedule 14C.

[298] The proxy rules apply only to domestic companies with securities registered under Section 12 of the Exchange Act and to investment companies registered under the Investment Company Act. The number of annual reports by reporting companies may differ from the number of proxy and information statements filed with the Commission in any given year. This is because some companies are subject to reporting requirements by virtue of Section 15(d) of the Exchange Act, and therefore are not covered by the proxy rules. Also, some companies are subject to the proxy rules only because they have a class of debt registered under Section 12. These companies generally are not required to hold annual meetings for the election of directors. In addition, companies that are not listed on a national securities exchange may not hold annual meetings and therefore would not be required to file a proxy or information statement.

[299] For convenience, the estimated PRA hour burdens have been rounded to the nearest whole number. We estimate an hourly cost of $400 per hour for the service of outside professionals based on our consultations with several registrants and law firms and other persons who regularly assist registrants in preparing and filing proxy statements and related disclosures with the Commission.

not be permitted to exclude a shareholder proposal that would amend, or that requests an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11.

For purposes of the PRA, we estimate the total annual incremental paperwork burden resulting from the proposed amendment to Rule 14a–8(i)(8) and the related rule changes for reporting companies (other than registered investment companies), registered investment companies, and shareholders to be approximately 7,692 hours of internal company or shareholder time and a cost of approximately $1,025,500 for the services of outside professionals.

In connection with proposed Rule 14a–11 and the proposed amendment to Rule 14a–8(i)(8), we also are proposing new rules that would require a notice to be filed with the Commission on proposed new Schedule 14N, and provided to the company, when a shareholder seeks to submit a nomination to a company pursuant to Rule 14a–11 or pursuant to an applicable state law provision or the company's governing documents. The Schedule 14N would include disclosure similar to the disclosure currently required in a proxy contest. The nominating shareholder or group would provide the disclosure specified in Rule 14a–18 or Rule 14a–19, as applicable, in the Schedule 14N. The company would be required to include the disclosure provided by the nominating shareholder in its proxy materials.

We also are proposing a new exemption from the proxy rules for communications by nominating shareholders or groups that are soliciting in favor of a shareholder nominee for director included pursuant to Rule 14a–11. This exemption would require inclusion in the written soliciting materials of a legend advising shareholders to look at the company's proxy statement when it becomes available and advising shareholders how to find the company's proxy statement. The burden hours resulting from the proposed exemption are included in the above totals related to proposed Rule 14a–11.

Compliance with the proposed disclosure requirements would be mandatory. There would be no mandatory retention period for the information disclosed, and responses to the disclosure requirements would not be kept confidential.

C. Paperwork Reduction Act Burden Estimates

The proposed amendments would, if adopted, require additional disclosure on Schedules 14A and 14C and new Schedule 14N, as well as Form 8–K. Schedule 14A prescribes the information that a company and/or a soliciting shareholder must include in its proxy statement to provide shareholders with material information relating to voting decisions. Schedule 14C prescribes the information that a company that is registered under Exchange Act Section 12 must include in its information statement in advance of a shareholders' meeting when it is not soliciting proxies from its shareholders, including when it takes corporate action by written authorization or consent of shareholders. When filed in connection with Rule 14a–11, Schedule 14N would require disclosure about the amount and percentage of securities entitled to be voted on the election of directors by the nominating shareholder or group, the length of ownership of such securities, and the nominating shareholder's or group's intent to continue to hold the securities through the date of the meeting. Schedule 14N would also require a certification that the nominating shareholder or group is not seeking to change the control of the company or to gain more than a limited number of seats on the board, as well as disclosure similar to the disclosure currently required for a contested election and certain representations required for use of Rule 14a–11, including that the nominee meets the generally applicable objective criteria for ''independence'' in any applicable national securities exchange or national securities association rules. When filed in connection with a nomination pursuant to an applicable state law provision or the company's governing documents, the Schedule 14N would include similar but more limited disclosures and representations. Exchange Act Rule 14a–8 requires the company to include a shareholder proposal in its Schedule 14A or 14C unless the shareholder has not complied with the procedural requirements in Rule 14a–8 or the proposal falls within one of the 13 substantive bases for exclusion in Rule 14a–8. Investment Company Act Rule 20a–1 requires registered investment companies to comply with Exchange Act Regulation 14A or 14C, as applicable.[300]

[300] The annual responses to Investment Company Act Rule 20a–1 reflect the number of proxy and information statements that are filed by registered investment companies.

1. Proposed Rule 14a–11

Proposed Rule 14a–11 would require any subject company to include disclosure about a nominating shareholder's or group's nominee or nominees for election as director in the company's proxy materials when the conditions of the rule are met. The proposed rule would apply unless state law or a company's governing documents prohibit shareholders from nominating a candidate or candidates for election as director. A nominating shareholder or group would be required to file proposed Schedule 14N to disclose information about the nominating shareholder or group and the nominee or nominees, and the company would be required to include certain information regarding the nominating shareholder or group and nominee or nominees in the company's proxy statement unless the company determines that it is not required to include the nominee or nominees in its proxy materials.[301] Nominating shareholders also would be afforded the opportunity to include in the company's proxy statement a statement of support for its nominee or nominees of a length not to exceed 500 words. The nominee or nominees also would be included on the company's form of proxy in accordance with Exchange Act Rule 14a–4.

Under the proposed rule, shareholders or groups beneficially owning at least 1%, 3%, or 5% of a company's securities entitled to be voted on the election of directors, for large accelerated, accelerated, and non-accelerated filers, respectively, would be eligible to submit a nominee for election as director to be included in the company's proxy materials subject to certain limitations on the overall number of shareholder nominees for director.

We estimate that 4,163 reporting companies (other than registered investment companies) are likely to have at least one shareholder that could meet the above thresholds.[302] For

[301] The burdens associated with Schedule 14N and the disclosure requirements of Rule 14a–18 and Rule 14a–19 are discussed in Section IV.C.3. below.

[302] We estimate that 1,385 large accelerated filers have at least one shareholder that meets the 1% threshold; 1,584 accelerated filers have at least one shareholder meeting the 3% threshold; and 1,194 non-accelerated filers have at least one shareholder meeting the 5% threshold. *See* Section II.B.3., above.

Shareholders would be permitted to aggregate holdings for purposes of meeting the eligibility thresholds in Rule 14a–11 and therefore the Commission anticipates that some groups of shareholders may beneficially own in the aggregate more than 5% of the company's securities that are

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purposes of this analysis, we estimate that 5% of companies with shareholders eligible to submit nominees pursuant to Rule 14a–11 will receive nominees from shareholders for inclusion in their proxy materials, which would result in 208 companies with shareholders meeting the applicable eligibility threshold receiving nominees annually.[303] We further estimate that 61 registered investment companies will receive nominees from shareholders pursuant to Rule 14a–11 annually.[304] For purposes of the PRA, we estimate that the incremental disclosure burden will be 95 hours per nominee for each reporting company (other than registered investment companies) and registered investment company to comply with the requirements of Rule 14a–11 and Items 7(e) and (f) and 22(b)(18) and (19) of Schedule 14A.[305] As discussed, we estimate for PRA purposes that each company that receives nominees pursuant to Rule 14a–11 will receive two nominees from shareholders or groups. Thus, for reporting companies (other than registered investment companies) we estimate 13,015 total company burden hours which corresponds to 9,761 hours of company time, and a cost of approximately $1,301,500 for the services of outside professionals. In the case of registered investment companies, we estimate the total annual incremental paperwork burden to prepare the disclosure that would be required under this portion of the proposed rules to be approximately 3,805 burden hours, which corresponds to 2,854 hours of company time and a cost of approximately $380,500 for the services of outside professionals. In each case, this estimate includes:

- If the company determines that it will include a shareholder nominee, the company's preparation of a written notice to the nominating shareholder or group (five burden hours per notice);
- The company's inclusion in its proxy statement and form of proxy of the name of, and other related disclosures concerning, a person or persons nominated by a shareholder or shareholder group (five burden hours per nominee); [306]
- The company's preparation of its own statement regarding the shareholder nominee or nominees (20 burden hours per nominee); and
- If a company determines that it may exclude a shareholder nominee submitted pursuant to the proposed rule, the company's preparation of a written notice to the nominating shareholder or group followed by written notice of the basis for its determination to exclude the nominee to the Commission staff (65 burden hours per notice).

For purposes of this analysis, we assume that approximately 187 (or 90% of) reporting companies (other than registered investment companies) and 55 (or 90% of) registered investment companies that have a shareholder or group and receives a shareholder nominee for director would be required to include the nominee in its proxy materials. In the other 10% of cases we assume that the company would be able to exclude the shareholder nominee (after providing notice of its reasons to the Commission). If a company determines to include a shareholder nominee, it must provide written notice to the nominating shareholder or group. We estimate the burden associated with preparing this notice to be five hours. For reporting companies (other than registered investment companies), this would result in 935 aggregate burden hours (187 companies × 5 hours/company), which corresponds to 701 burden hours of company time (187 companies × 5 hours/company × .75) and $93,500 in services of outside professionals (187 companies × 5 hours/company × .25 x $400). For registered investment companies, this would result in 275 aggregate burden hours (55 companies × 5 hours/company), which corresponds to 206 burden hours of company time (55 companies × 5 hours/company × .75), and $27,500 for services of outside professionals (55 companies × 5 hours/company × .25 × $400).

We estimate the annual disclosure burden for companies to include nominees on their form of proxy and proxy materials to be 5 burden hours per nominee, for a total of 1,870 aggregate burden hours (187 responses × 5 hours/response × 2 nominees) for reporting companies (other than registered investment companies), and 550 aggregate burden hours (55 responses × 5 hours/response × 2 nominees) for registered investment companies. For reporting companies (other than registered investment companies), this corresponds to 1,403 burden hours of company time, and $187,000 for services of outside professionals.[307] For registered investment companies, this corresponds to 413 hours of company time, and $55,000 for services of outside professionals.[308]

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eligible to vote for the election of directors. In these circumstances, nominating shareholders will need to consider whether they have formed a group under Exchange Act Section 13(d)(3) and Rule 13d–5(b)(1) that is required to file beneficial ownership reports. To the extent nominating shareholder groups exceed the 5% threshold and file a Schedule 13G this would result in an increased number of Schedule 13G filings. We estimate that 25% of the nominees will be from shareholders who individually meet the eligibility thresholds (52), and 75% will be from shareholder groups (156). Were each of these groups to exceed 5%, we estimate that an additional 156 Schedule 13G filings will be made annually as a result of the proposed rule. The total burden associated with this increase in the number of filings is 1935 burden hours (156 additional Schedule 13Gs × 12.4 hours/schedule). This burden corresponds to 484 hours of shareholder time (156 additional Schedule 13Gs × 12.4 hours/Schedule × .25) and $580,320 for services of outside professionals (156 additional Schedule 13Gs × 12.4 hours/Schedule × .75 x $400).

[303] In this regard, we note that in 2008 there were at least 32 contested elections. *See* RiskMetrics Group, 2008 Postseason Report Summary, Weathering the Storm: Investors Respond to the Global Credit Crisis, October 2008. In addition, approximately 118 Rule 14a–8 shareholder proposals related to board issues were submitted to shareholders for a vote in the 2008–2009 proxy season. *See* RiskMetrics 2009 Proxy Season Scorecard, May 15, 2009. We believe these two numbers, or 150 shareholders in total, provide some indication of the number of shareholders that may be interested in using Rule 14a–11. Based upon this information, we believe it is reasonable to use 208 (based on 5% of the companies that have at least one shareholder that meets the ownership threshold) as the estimate for the number of companies that may receive nominees.

[304] We estimate that approximately 1,225 registered investment companies will hold a shareholder meeting in a given year, based on the number of responses to Rule 20a–1, and that 5% of such companies will receive nominees from shareholders for inclusion in their proxy materials. We believe that using the 5% estimate for registered investment companies is reasonable because we estimate that shareholders of registered closed-end and open-end investment companies will on balance submit nominees at the same rate as other companies.

[305] The actual burden hours will depend on the number of shareholder nominees submitted to a company for inclusion in its proxy materials. For purposes of the PRA, in the case of reporting companies (other than registered investment companies) we assume each shareholder or group would submit two nominees. As discussed in footnote 183 above, the median board size based on a 2007 sample of public companies was nine. Approximately 60% of the boards sampled had between nine and 19 directors. In the case of registered investment companies, we estimate that the median board size is eight. *See* Investment Company Institute and Independent Directors Council, *Overview of Fund Governance Practices 1994–2006,* at 6–7 (November 2007), *available at:http://www.ici.org/issues/dir/1rpt_07_fund_gov_practices.pdf* (noting that the median number of independent directors per fund complex in 2006 was six and that independent directors held 75% or more of board seats in 88% of fund complexes). Thus, although some shareholders or groups could nominate fewer than two nominees and others would be permitted to nominate more than two nominees, depending on the size of the board, we assume for purposes of the PRA that each shareholder or group would submit two nominees.

[306] The requirement is in proposed amended Rule 14a–4.

[307] The calculations for these numbers are: 1,870 burden hours × .75 = 1,402 burden hours of company time and 1,870 burden hours × .25 × $400 = $187,000 for services of outside professionals.

[308] The calculations for these numbers are: 550 burden hours × .75 = 413 hours of company time

We estimate that 187 reporting companies (other than registered investment companies) and 55 registered investment companies would include a statement with regard to the shareholder nominees.[309] We anticipate that the burden to include a statement would include time spent to research the nominee's background, preparation of the statement, and company time for review of the statement by, among others, the nominating committee and legal counsel. We estimate that this burden would be approximately 20 hours per nominee. For reporting companies (other than registered investment companies), this would result in 7,480 aggregate burden hours (187 statements × 20 hours/statement × 2 nominees). This corresponds to 5,610 hours of company time (187 statements × 20 hours/statement × 2 nominees × .75) and $748,000 for services of outside professionals (187 statements × 20 hours/statement × 2 nominees × .25 × $400) for reporting companies (other than registered investment companies). For registered investment companies, this would result in 2,200 aggregate burden hours (55 statements × 20 hours/statement × 2 nominees). This corresponds to 1,650 hours of company time (55 statements × 20 hours/statement × 2 nominees × .75) and $220,000 for services of outside professionals (55 statements × 20 hours/statement × 2 nominees × .25 × $400).

Further, for purposes of this analysis, we assume that approximately 42 (or 20% of) reporting companies (other than registered investment companies) and 12 (or 20% of) registered investment companies who receive a shareholder nominee for director for inclusion in their proxy materials would make a determination that they are not required to include a nominee in their proxy materials because the nominee is ineligible under proposed Rule 14a–11 and would file a notice of intent to exclude that nominee.[310] We estimate that the burden hours associated with preparing and submitting the company's notification to the nominating shareholder or group and the Commission regarding its intent to exclude a shareholder nominee, and its reasons for doing so, would be 65 hours per notification.[311] In the case of reporting companies (other than registered investment companies), we estimate that this would result in an aggregate burden of 2,730 (42 notices × 65 hours/notice), corresponding to 2,048 hours of company time (42 notices × 65 hours/notice × .75) and $273,000 for the services of outside professionals (42 responses × 65 hours/notice × .25 × $400). In the case of registered investment companies, we estimate that this would result in 780 aggregate burden hours (12 notices × 65 hours/notice), which would correspond to 585 hours of company time (12 notices × 65 hours/notice × .75) and $78,000 for the services of outside professionals (12 notices × 65 hours/notice × .25 × $400). These burdens would be added to the PRA burdens of Schedules 14A and 14C or, in the case of registered investment companies, Rule 20a–1.

We also estimate that the annual incremental burden for the nominating shareholder's or group's participation in the Rule 14a–11 exclusion process would average 30 hours per nomination.[312] For nominating shareholders or groups of reporting companies (other than registered investment companies), this would result in 1,260 total burden hours (42 responses × 30 hours/response). This would correspond to 945 hours of shareholder time (42 responses × 30 hours/response × .75) and $126,000 for services of outside professionals (42 responses × 30 hours/response × .25 × $400). For nominating shareholders or groups of registered investment companies, this would result in 360 total burden hours (12 responses × 30 hours/response). This would correspond to 270 hours of shareholder time (12 responses × 30 hours/response × .75) and $36,000 for services of outside professionals (12 responses × 30 hours/response × .25 × $400). This burden would be added to the PRA burden of Schedule 14N.

We also are proposing a new exemption from the proxy rules for communications by nominating shareholders or groups that are soliciting in favor of a shareholder nominee for director. Although nominating shareholders or groups would not be required to engage in written solicitations, the exemption would require inclusion in any written soliciting materials of a legend advising shareholders to look at the company's proxy statement when it becomes available and advising shareholders how to find the company's proxy statement. For purposes of this analysis, we assume that 50% of nominating shareholders or groups would solicit in favor of their nominee or nominees outside the company's proxy statement. In the case of reporting companies (other than registered investment companies), this would result in an aggregate burden of 104 hours (104 solicitations × 1 hour/solicitation), which corresponds to 78 hours of shareholder time (104 solicitations × 1 hour/solicitation × .75) and $10,400 for services of outside professionals (104 solicitations × 1 hour/solicitation × .25 × $400). These burden hours would be added to the PRA burden of Schedule 14A.[313]

2. Proposed Amendment to Rule 14a–8(i)(8)

Our proposed amendment to Rule 14a–8(i)(8), the election exclusion, would enable shareholders to submit proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11. As proposed, revised Rule 14a–8(i)(8) would not restrict the types of amendments that a shareholder could propose to a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, although any

and 550 burden hours × .25 × $400 = $55,000 for services of outside professionals.

[309] We estimate that each company that includes a shareholder nominee in its proxy materials would include such a statement.

[310] We assume that 21 of these nominees (or 50% of those sought to be excluded by companies) would ultimately be excludable under the rule.

[311] This estimate is based on data provided by the American Society of Corporate Secretaries in its comment letter on the 2003 Proposal. In its letter, the ASCS provided data from a survey of its own, as well as the Business Roundtable's, members indicating that the average burden associated with preparing and submitting a no-action request to the staff in connection with a shareholder proposal was approximately 30 hours and associated costs of $13,896. Although the letter did not specify as much, assuming these costs correspond to legal fees, which we estimate at an hourly cost of $400, we estimate that this cost is equivalent to approximately 35 hours ($13,896/$400). For purposes of the PRA, we assume that submitting the notice and reasons for excluding a shareholder nominee to the staff will be comparable to preparing a no-action request to exclude a proposal under Rule 14a–8. Thus, we estimate that the burden to submit the notice and reasons for excluding a shareholder nominee would be approximately 65 hours.

[312] As noted in footnote 311, above, we estimate that the average burden to a company associated with preparing and submitting a no-action request to the staff is approximately 65 burden hours. We believe that the average burden for a shareholder proponent to respond to a company's no-action request is likely to be less than a company's burden; therefore, we estimate 30 burden hours for a nominating shareholder to respond to a company's notice of intent to exclude to the Commission.

[313] In the case of registered investment companies, this would result in an aggregate burden of 31 hours (31 solicitations × 1 hour/solicitation), which corresponds to 23 hours of shareholder time (31 solicitations × 1 hour/solicitation × .75) and $3,100 for services of outside professionals (31 solicitations × 1 hour/solicitation × .25 × $400). These burden hours would be added to the PRA burden of Rule 20a–1.

such proposals that conflict with proposed Rule 14a–11 or state law could be excluded. The proposal would have to meet the procedural requirements of Rule 14a–8 and not be subject to one of the substantive exclusions other than the election exclusion (*e.g.,* the proposal could be excluded if the shareholder proponent did not meet the ownership threshold under Rule 14a–8).

Historically, shareholders have made relatively few proposals relating to shareholder access to company proxy materials. The staff received 368 no-action requests from companies seeking to exclude shareholder proposals during the 2006–2007 proxy season. Of these requests, only three (or approximately one percent) related to proposals for bylaw amendments providing for shareholder nominees to appear in the company's proxy materials. During the 2007–2008 proxy season, the staff received 432 no-action requests to exclude shareholder proposals pursuant to Rule 14a–8. Of these no-action requests, 6 (or approximately two percent) related to proposals for bylaw amendments providing for shareholder nominees to appear in the company's proxy materials. Because our proposed amendment to Rule 14a–8(i)(8) would narrow the scope of the exclusion and prohibit companies from excluding certain proposals that are excludable under the current Rule 14a–8(i)(8), we anticipate an increase in the number of shareholder proposals to amend, or request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations.

While the number of no-action requests the staff has received in the past is a useful starting point, other data also is helpful to gauge shareholder interest in nominating directors and predict the anticipated impact on the number of proposals submitted pursuant to Rule 14a–8 to amend, or request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations that otherwise would be excludable under current Rule 14a–8(i)(8). For example, based on publicly available information, from 2001 to 2005, there were an average of 14 contested elections per year.[314] In 2008, it is estimated that there were at least 32 contested elections.[315] We anticipate that as a result of the proposed amendment to Rule 14a–8(i)(8), shareholders will submit at least as many shareholder proposals to amend a company's governing documents to address the company's nomination procedures or disclosures related to director nominations as there are contested elections. We anticipate that if shareholders are willing to put forth the expense and effort to wage a contest to put forth their own nominees in 32 instances, there will be at least that many proposals submitted to companies pursuant to Rule 14a–8 because companies will no longer be permitted under the rule to exclude proposals that currently are excludable under Rule 14a–8(i)(8). We also anticipate that some shareholders that have submitted proposals in the past with regard to other board issues will submit proposals to address a company's nomination procedures or disclosures related to director nominations. According to information from RiskMetrics, approximately 118 Rule 14a–8 shareholder proposals regarding board issues were or will be submitted to shareholders for a vote in the 2008–2009 proxy season.[316] We estimate that approximately half of these shareholders would submit a proposal regarding nomination procedures or disclosures, resulting in 59 proposals.

In the case of reporting companies (other than registered investment companies), we anticipate that the amendments to Rule 14a–8 will result in an increase of 38 proposals annually from 2008, and a total of 97 proposals regarding nomination procedures or disclosures related to director nominations to companies per year.[317] We estimate the annual incremental burden for the shareholder to prepare the proposal to be 10 burden hours per proposal, for a total of 380 burden hours (38 proposals × 10 hours/proposal). This would correspond to 285 hours of shareholder time (38 proposals × 10 hours/proposal × .75) and $38,000 for the services of outside professionals (38 proposals × 10 hours/proposal × .25 × $400).

We estimate that 90% of companies that receive a shareholder proposal to amend, or request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations will seek to exclude the proposal from their proxy materials (so companies would seek to exclude 87 such proposals per proxy season). We estimate that the annual incremental burden for the company's submission of a notice of its intent to exclude the proposal and its reasons for doing so would average 65 hours per proposal, for a total of 5,655 burden hours (87 proposals × 65 hours/proposal) for reporting companies (other than registered investment companies). This would correspond to 4,241 hours of company time (87 proposals × 65 hours/proposal × .75) and $565,500 for the services of outside professionals (87 proposals × 65 hours/proposal × .25 × $400).

We also estimate that the annual incremental burden for the proponent's participation in the Rule 14a–8 no-action process would average 30 hours per proposal, for a total of 2,610 burden hours (87 proposals × 30 hours/proposal).[318] This would correspond to 1,958 hours of shareholder time (87 proposals × 30 hours/proposal × .75) and $261,000 for services of outside professionals (87 proposals × 30 hours/proposal × .25 × $400). These burdens would be added to the PRA burden of Schedules 14A and 14C.

In the case of registered investment companies, we anticipate that the amendments to Rule 14a–8 will result in an increase of 9 proposals annually, and a total of 18 proposals regarding

[314] *See* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise,* 93 Va. L. Rev. 675 (2007) (''Bebchuk 2007 Article'') (citing data from proxy solicitation firm Georgeson Shareholder).

[315] *See* RiskMetrics Group, 2008 Postseason Report Summary, Weathering the Storm: Investors Respond to the Global Credit Crisis, October 2008.

[316] *See* footnote 303, above.

[317] The increase is calculated by adding the number of proxy contests in 2008 (32) plus the number of no-action requests received in 2008 regarding proposals seeking to amend a company's bylaws to provide for shareholder director nominations (6). We have not included the estimated 59 proposals in this increase because we believe they will be submitted in lieu of other types of proposals (a shareholder is limited to submitting one shareholder proposal to each company). We recognize that a company that receives a shareholder proposal has no obligation to submit a no-action request to the staff under Rule 14a–8 unless it intends to exclude the proposal from its proxy materials. Based on historical data, companies generally seek no-action relief from the staff on approximately 60% of the proposals received. However, we anticipate that because the proposals that would be submitted pursuant to amended Rule 14a–8 could affect the composition of the company's board of directors, nearly all companies receiving such proposals would submit a written statement of its reasons for excluding the proposal to the staff. Thus, we estimate that 90% of the estimated 97 companies receiving proposals to amend, or request an amendment to, a company's governing documents to address nomination procedures or disclosures related to director nominations would submit a written statement of its reasons for excluding the proposal to the staff.

[318] As noted above, in footnote 311, we estimate that the average burden to a company associated with preparing and submitting a no-action request to the staff was approximately 65 burden hours. We believe that the average burden for a shareholder proponent to respond to a company's no-action request is likely to be less than a company's burden; therefore, we estimate 30 burden hours for a shareholder proponent to respond to a company's notice of intent to exclude to the Commission. In this regard, we also estimate that the average burden for a shareholder proponent to submit a shareholder proposal would be 10 hours.

nomination procedures or disclosures related to director nominations to companies per year.[319] We estimate the annual incremental burden for the shareholder proponent to prepare the proposal to be 10 hours per proposal, for a total of 90 burden hours (9 proposals × 10 hours/proposal). This would correspond to 68 hours of shareholder time (9 proposals × 10 hours/proposal × .75) and $9,000 for the services of outside professionals (9 proposals × 10 hours/proposal × .25 × $400).

Similar to reporting companies other than investment companies, we assume that 90% of registered investment companies that receive a shareholder proposal to amend, or request an amendment to, the company's governing documents regarding nomination procedures or disclosures related to shareholder nominations will seek to exclude the proposal from their proxy materials (so registered investment companies would seek to exclude 16 such proposals per proxy season). Also similar to reporting companies other than investment companies, we assume that the annual incremental burden for the company's submission of a notice of its intent to exclude the proposal and its reasons for doing so would average 65 hours per proposal, for a total of 1,040 burden hours for registered investment companies (16 proposals × 65 hours/proposal). This would correspond to 780 hours of company time (16 proposals × 65 hours/proposal × .75) and $104,000 for the services of outside professionals (16 proposals × 65 hours/proposal × .25 × $400). We also estimate that the annual incremental burden for the proponent's participation in the Rule 14a–8 no-action process would average 30 hours per proposal, for a total of 480 burden hours (16 proposals × 30 hours/proposal). This would correspond to 360 hours of shareholder time (16 proposals × 30 hours/proposal × .75) and $48,000 for the services of outside professionals (16 proposals × 30 hours/proposal × .25 × $400). These burdens would be added to the PRA burden of Rule 20a–1.

[319] The increase is calculated by adding the average number of registered investment company proxy contests in calendar years 2006, 2007, and 2008 (8) plus the average number of no-action letters issued by the staff regarding proposals seeking to amend a registered investment company's bylaws to provide for shareholder director nominations received in calendar years 2006, 2007, and 2008 rounded to the nearest whole number greater than zero (1). In addition, we estimate that investment companies currently receive as many proposals regarding nomination procedures or disclosures as there are contested elections and no-action letters issued by the staff, resulting in a total of 18 proposals regarding nomination procedures or disclosures related to director nominations to companies per year.

3. Proposed Schedule 14N and Proposed Exchange Act Rules 14a–18 and 14a–19

Proposed Rule 14n–1 would establish a new filing requirement for the nominating shareholder or group, under which the nominating shareholder or group would be required to file notice of its intent to include a shareholder nominee or nominees for director pursuant to proposed Rule 14a–11, applicable state law provisions, or a company's governing documents, as well as disclosure about the nominating shareholder or group and nominee or nominees on proposed new Schedule 14N. New Schedule 14N was modeled after Schedule 13G, but with more extensive disclosure requirements than Schedule 13G. The Schedule 14N would require, among other items, disclosure about the amount and percentage of securities owned by the nominating shareholder or group, the length of ownership of such securities, and the nominating shareholder's or group's intent to continue to hold the securities through the date of the meeting.

In addition, the Schedule 14N would include disclosure required pursuant to proposed Rule 14a–18 or Rule 14a–19, as applicable. Proposed Rule 14a–18 would prescribe the disclosure required to be included in the nominating shareholder's notice to the company, on Schedule 14N, of its intent to require that the company include that shareholder's nominee in the company's proxy materials pursuant to proposed Rule 14a–11. Proposed Rule 14a–19 would prescribe the disclosure required to be included in the nominating shareholder's notice to the company, on Schedule 14N, of its intent to require the company to include a nominee pursuant to applicable state law provisions or a company's governing documents. With regard to the latter, we are seeking to assure that nominating shareholders or groups who submit a shareholder nomination for inclusion in company proxy materials pursuant to applicable state law provisions or the company's governing documents also provide disclosure similar to the disclosure required in a contested election to give shareholders the information needed to make an informed voting decision.

Both rules would require disclosures regarding the nature and extent of the relationships between the nominating shareholder and nominee and the company or any affiliate of the company. Pursuant to proposed Items 7(e)–(f) of Schedule 14A or, in the case of a registered investment company, Items 22(b)(18)–(19) of Schedule 14A, the company would be required to include the information set forth in Schedule 14N in its proxy materials. A nominating shareholder filing a Schedule 14N to provide disclosure required by proposed Rule 14a–19 when submitting a nominee for inclusion in company proxy materials pursuant to applicable state law provisions or the company's governing documents would not be required to provide the representations required for nominating shareholders using proposed Rule 14a–11.

We estimate that compliance with the proposed Schedule 14N requirements would result in a burden greater than Schedule 13G[320] but less than a Schedule 14A.[321] Therefore, we estimate that compliance with proposed Schedule 14N will result in 47 hours per response for nominees submitted pursuant to Rule 14a–11.[322] We also note that the burden associated with filing a Schedule 14N in connection with a nomination made pursuant to an applicable state law provision or the company's governing documents may be slightly less than a nomination made pursuant to Rule 14a–11 because certain disclosures, representations and certifications would not be required (including disclosure about intent to continue to own the company's securities, the representations that would be required to rely on Rule 14a–11, a supporting statement from the nominating shareholder or group, and the certification concerning lack of intent to change control or to gain more than a limited number of seats on the board that would be required for a nomination pursuant to Rule 14a–11). Therefore, we estimate that compliance with proposed Schedule 14N when a shareholder or group submits a nominee or nominees to a company pursuant to an applicable state law provision or the company's governing documents will result in 40 hours per response.

[320] We currently estimate the burden per response for preparing a Schedule 13G filing to be 12.4 hours.

[321] We currently estimate the burden per response for preparing a Schedule 14A filing to be 101.50 hours and a Schedule 14C to be 102.62 hours.

[322] We estimate that the burden of preparing the information in Schedule 14N for a nominating shareholder or group would be ⅓ of the disclosures typically required by a Schedule 14A filing, which would result in approximately 34 burden hours. For purposes of this analysis, we estimate that the 34 burden hours will be added to the 12.4 hours associated with filing a Schedule 13G, resulting in a total of approximately 47 burden hours. We estimate that 75% of the burden of preparation of Schedule 14N will be borne internally by the nominating shareholder or group, and that 25% will be carried by outside professionals. We believe the nominating shareholder or group would work with their nominee to prepare the disclosure and then have it reviewed by outside professionals.

For purposes of the PRA, we estimate the total annual incremental paperwork burden for nominating shareholders or groups to prepare the disclosure that would be required under this portion of the proposed rules to be approximately 28,565 hours of shareholder time, and $3,808,600 for the services of outside professionals.[323] This estimate includes the nominating shareholder's or group's preparation and filing of the notice and required disclosure and, as applicable, representations and certifications on Schedule 14N.

We do not expect that every shareholder that meets the eligibility threshold to submit a nominee for inclusion in a company's proxy materials pursuant to proposed Rule 14a–11, an applicable state law provision, or a company's governing documents will do so. As discussed above, we estimate that 208 reporting companies (other than registered investment companies) and 61 registered investment companies will receive notices of intent to submit nominees pursuant to proposed Rule 14a–11. We anticipate that some companies will receive nominees from more than one shareholder or group, though, as discussed above, for purposes of PRA estimates, we assume each company with an eligible shareholder would receive two nominees from only one shareholder or group.

We estimate that compliance with the requirements of Schedule 14N submitted pursuant to Rule 14a–11 will require 19,552 burden hours (208 notices × 47 hours/notice × 2 nominees/shareholder) in aggregate each year for nominating shareholders or groups of reporting companies (other than registered investment companies), which corresponds to 14,664 hours of shareholder time (208 notices × 47 hours/notice × 2 nominees/shareholder × .75) and costs of $1,955,200 (208 notices × 47 hours/notice × 2 nominees/shareholder .25 × $400) for the services of outside professionals. In the case of registered investment companies, we estimate that a nominating shareholder's or group's compliance with the requirements of Schedule 14N will require 5,734 burden hours (61 responses × 47 hours/response × 2 nominees) in aggregate each year, which corresponds to 4,301 hours of shareholder time (61 responses × 47 hours/response × 2 nominees × .75) and costs of $573,400 for the services of outside professionals (61 responses × 47 hours/response × 2 nominees × .25 × $400). Therefore, we estimate a total of 25,286 burden hours for all reporting companies, including investment companies, broken down into 18,965 hours of shareholder time and $2,528,600 for services of outside professionals.

We assume that all nominating shareholders or groups will prepare a statement of support for the nominee or nominees, and we estimate the disclosure burden for the nominating shareholder or group to prepare a statement of support for its nominee or nominees to be approximately 10 burden hours per nominee. This results in an aggregate burden of 4,160 (208 statements × 10 hours/statement × 2 nominees/shareholder), which corresponds to 3,120 hours of shareholder time (208 statements × 10 hours/statement × 2 nominees/shareholder × .75) and $416,000 for services of outside professionals (208 statements × 10 hours/statement × 2 nominees/shareholder × .25 × $400) for shareholders of reporting companies (other than registered investment companies). For registered investment companies, this would result in an aggregate burden of 1,220 (61 statements × 10 hours/statement × 2 nominees/shareholder), which corresponds to 915 hours of shareholder time (61 statements × 10 hours/statement × 2 nominees/shareholder × .75) and $122,000 for services of outside professionals (61 statements × 10 hours/statement × 2 nominees/shareholder × .25 × $400). Therefore, we estimate a total of 5,380 burden hours for all reporting companies, including investment companies, broken down into 4,035 hours of shareholder time and $538,000 for services of outside professionals.

When a nominating shareholder or group submits a nominee or nominees to a company pursuant to an applicable state law provision or the company's governing documents, the nominating shareholder or group will be required to file a Schedule 14N to provide disclosure about the nominating shareholder or group and the nominee or nominees as provided in proposed Rule 14a–19. As discussed, a company will be required to include certain disclosures about the nominating shareholder or group and the nominee or nominees in its proxy statement. As noted above, we estimate that the burden associated with filing a Schedule 14N in connection with a nomination made pursuant to an applicable state law provision or a company's governing documents is 40 hours. We also estimate that approximately 49 nominating shareholders or groups of reporting companies (other than registered investment companies) would submit a nomination pursuant to an applicable state law provision or a company's governing documents.[324] Thus, we estimate compliance with the requirements of Schedule 14N for nominating shareholders or groups submitting nominations pursuant to an applicable state law provision or the company's governing documents would result in 3,920 aggregate burden hours (49 notices × 40 hours/notice × 2 nominees/shareholder) each year for nominating shareholders or groups of reporting companies (other than registered investment companies), broken down into 2,940 hours of shareholder time (49 notices × 40 hours/notice × 2 nominees/shareholder × .75) and costs of $392,000 for the services of outside professionals (49 notices × 40 hours/notice × 2 nominees/shareholder × .25 × $400). In the case of registered investment companies, we estimate that approximately 9 nominating shareholders or groups would submit a nomination pursuant to an applicable state law provision or a company's governing documents.[325] We estimate that a nominating shareholder's or group's compliance with the requirements of Schedule 14N would result in 720 aggregate burden hours (9 notices × 40 hours/notice × 2 nominees/shareholder) each year, which corresponds to 540 hours of shareholder time (9 notices × 40 hours/notice × 2 nominees/shareholder × .75) and costs of $72,000 for the services of outside professionals (9 notices × 40 hours/notice × 2 nominees/shareholder × .25 × $400). Therefore, we estimate that the total burden hours would be 4,640 for all reporting companies, including investment companies, broken down into 3,480 hours of shareholder time

[323] This figure represents the aggregate burden hours attributed to proposed Schedule 14N and is the sum of the burden associated with Schedules 14N submitted pursuant to Rule 14a–11, applicable state law provisions, and a company's governing documents.

[324] In this regard, we estimated that approximately 97 shareholder proponents would submit proposals regarding nomination procedures or disclosures related to shareholder nominations. For purposes of this analysis, we assume that approximately half (49) of those shareholders would be eligible to submit a nomination pursuant to applicable state law provisions or a company's governing documents.

[325] In this regard, we estimated that approximately 18 shareholder proponents would submit proposals to registered investment companies regarding nomination procedures or disclosures related to shareholder nominations. We estimate that approximately half (9) of those shareholders would be eligible to submit a nomination pursuant to applicable state law provisions or a company's governing documents.

and $464,000 for services of outside professionals.

We assume that all nominating shareholders or groups that submit a nominee or nominees pursuant to an applicable state law provision or a company's governing documents would prepare a statement of support for the nominee or nominees,[326] and we estimate the disclosure burden for the nominating shareholder or group to prepare a statement of support for its nominee or nominees to be approximately 10 burden hours per nominee. This results in an aggregate burden of 980 hours (49 statements × 10 hours/statement × 2 nominees/shareholder) for shareholders of reporting companies (other than registered investment companies), which corresponds to 735 hours of shareholder time (49 statements × 10 hours/statement × 2 nominees/shareholder × .75) and $98,000 for services of outside professionals (49 statements × 10 hours/statement × 2 nominees/shareholder × .25 × $400). For registered investment companies, this results in an aggregate burden of 180 hours (9 statements × 10 hours/statement × 2 nominees/shareholder), which would correspond to 135 hours of shareholder time (9 statements × 10 hours/statement × 2 nominees/shareholder × .75) and $18,000 for services of outside professionals (9 statements × 10 hours/statement × 2 nominees/shareholder × .25 × $400). This results in a total of 1,160 burden hours, broken down into 870 hours of shareholder time and $116,000 for the services of outside professionals.

4. Proposed Amendments to Exchange Act Form 8–K

Under proposed Rule 14a–11, a nominating shareholder or group would have to provide a notice to the company, on Schedule 14N, of its intent to require that the company include the nominating shareholder's or group's nominee in the company's proxy materials by the date specified by the company's advance notice provision or, where no such provision is in place, no later than 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting.[327] If the company did not hold an annual meeting during the prior year, or if the date of the meeting has changed more than 30 days from the prior year, then the nominating shareholder or group would be required to provide notice a reasonable time before the company mails its proxy materials, as specified by the company in a Form 8–K filed pursuant to proposed Item 5.07. We also are proposing to require a registered investment company that is a series company to file a Form 8–K disclosing the company's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting and the total number of the company's shares that are entitled to vote for the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) as of the end of the most recent calendar quarter.

For purposes of the PRA, we estimate that approximately 4% of reporting companies (other than registered investment companies) would be required to file an Exchange Act Form 8–K because the company did not hold an annual meeting during the prior year, or the date of the meeting has changed by more than 30 days from the prior year.[328] Based on our estimate that there are approximately 11,000 reporting companies (other than registered investment companies), this corresponds to 440 companies that would be required to file a Form 8–K. In accordance with our current estimate of the burden of preparing a Form 8–K, we estimate 5 burden hours to prepare, review and file the Form 8–K, for a total burden of 2,200 hours (440 filings × 5 hours/filing). This total burden corresponds to 1,650 hours of company time (440 filings × 5 hours/filing × .75) and $220,000 for services of outside professionals (440 filings × 5 hours/filing × .25 x $400).

In the case of registered investment companies, we estimate that, similar to reporting companies other than registered investment companies, 4% of registered closed-end management investment companies subject to Rule 14a–11 that are traded on an exchange would be required to file an Exchange Act Form 8–K because the company did not hold an annual meeting during the prior year or the date of the meeting has changed by more than 30 days from the prior year.[329] We estimate that approximately 650 of the 1,225 registered investment companies responding to Investment Company Act Rule 20a–1 are closed-end funds that are traded on an exchange, resulting in 26 closed-end funds that would be required to file Form 8–K for these purposes (650 registered closed-end management investment companies × .04).[330] However, we estimate that few, if any, registered open-end management investment companies regularly hold annual meetings. Therefore, we estimate that 575 registered investment companies are not closed-end investment companies and would be required to file Form 8–K. This results in a total of 601 registered investment companies required to file Form 8–K (26 closed-end management investment companies + 575 other registered investment companies) and 3,005 burden hours (601 filings × 5 hours/filing). This total burden corresponds to 2,254 hours of company time (601 filings × 5 hours/filing × .75) and $300,500 for services of outside professionals (601 filings × 5 hours/filing × .25 × $400).[331] Adding the totals for reporting companies (other than registered investment companies) and registered investment companies results in a total burden of 5,205, which corresponds to 3,904 hours of company time and $520,500 for services of outside professionals. This includes the requirement for a registered investment company that is a series company to file a Form 8–K disclosing the company's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting and the total number of the company's shares that are entitled to vote for the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of

[326] We are assuming for PRA purposes that any applicable state law provision or company's governing documents would allow for inclusion of such a statement by the nominating shareholder or group.

[327] The proposed amendment to Rule 14a–8(i)(8) is not expected to impact Form 8–K, so the burden estimates solely reflect the burden changes resulting from proposed Rule 14a–11.

[328] Based on information obtained in 2003 from the Investor Responsibility Research Center, 3.7% of companies (other than registered investment companies) filed Form 8–Ks because they did not hold an annual meeting during the prior year or the date of the meeting has changed by more than 30 days from the prior year. *See also* footnote 195 in the 2003 Proposal.

[329] We believe that the percentage for registered closed-end investment companies would be similar to other reporting companies because such investment companies are traded on an exchange and are required to hold annual meetings of shareholders.

[330] We estimate that 1,225 registered investment companies hold annual meetings each year based on the number of responses to Rule 20a–1. Based on data provided by Lipper, the Commission estimates that approximately 650 registered closed-end management investment companies are traded on an exchange.

[331] Consistent with the current estimates for Form 8–K, we estimate that 75% of the burden of preparation of Form 8–K is carried by the company and that 25% of the burden of preparation of Form 8–K is carried by outside professionals at an average cost of $400 per hour. The burden includes disclosure of the date by which a nominating shareholder or group must submit the notice required by proposed Rule 14a–11(c) as well as disclosure of net assets, outstanding shares, and voting.

shareholders) as of the end of the most recent calendar quarter.

5. Form ID Filings [332]

Under proposed Rule 14a–11(c), a shareholder who submits a nominee or nominees for inclusion in the company's proxy statement must provide notice on Schedule 14N to the company of its intent to require that the company include the nominee or nominees in the company's proxy materials and file the Schedule 14N with the Commission. We anticipate that some shareholders that submit a nominee or nominees for inclusion in a company's proxy materials will not previously have filed an electronic submission with the Commission and will file a Form ID. Form ID is the application form for access codes to permit filing on EDGAR. The proposed rules are not changing the form itself, but we anticipate that the number of Form ID filings may increase due to shareholders filing Schedule 14N when submitting a nominee or nominees to a company for inclusion in its proxy materials pursuant to proposed Rule 14a–11. We estimate that 90% of the shareholders who submit a nominee or nominees for inclusion in the company's proxy materials will not have filed previously an electronic submission with the Commission and would be required to file a Form ID.[333] As noted above, we estimate that approximately 208 reporting companies (other than registered investment companies) and 61 registered investment companies will receive shareholder nominations submitted pursuant to proposed Rule 14a–11. This corresponds to 242 additional Form ID filings. In addition, as noted above, we estimate that approximately 49 reporting companies (other than registered investment companies) and 9 registered investment companies will receive shareholder nominations submitted pursuant to an applicable state law provision or a company's governing documents. This corresponds to an additional 52 Form ID filings. As a result, the additional annual burden would be 44 hours (294 filings x .15 hours/filing).[334] For purposes of the PRA, we estimate that the additional burden cost resulting from the proposed amendments will be zero because we estimate that 100 percent of the burden will be borne internally by the nominating shareholder.

D. Revisions to PRA Reporting and Cost Burden Estimates

Table 1 below illustrates the incremental annual compliance burden of the collection of information in hours and in cost for proxy and information statements and current reports under the Exchange Act. The burden was calculated by multiplying the estimated number of responses by the estimated average number of hours each entity spends completing the form. We estimate that 75% of the burden of preparation of the proxy and information statement and current reports is carried by the company internally, while 25% of the burden of preparation is carried by outside professionals at an average cost of $400 per hour. We estimate that 75 percent of the burden of preparation of Schedule 14N and Schedule 14A (with regard to the legend required for additional soliciting materials) will be carried by the nominating shareholder or group internally and that 25 percent of the burden of preparation will be carried by outside professionals retained by the nominating shareholder or group. We estimate that 25 percent of the burden of preparation of Schedule 13G (for nominating shareholder groups that exceed 5%) will be carried by the nominating shareholder or group internally and that 75 percent of the burden of preparation will be carried by outside professionals retained by the nominating shareholder or group. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried internally by the company and the nominating shareholder or group is reflected in hours.

TABLE 1—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES *

	Current annual responses (A)	Proposed annual responses (B)	Current burden hours (C)	Increase in burden hours (D)	Proposed burden hours (E)=C+D	Current professional costs (F)	Increase in professional costs (G)	Proposed professional costs =F+G
Sch 14A	7,300	7,300	555,683	14,692	570,375	$63,709,987	$1,958,760	$65,668,747
Sch 14C	680	680	52,337	1,632	53,969	5,951,639	217,640	6,169,279
Sch 14N	0	269	0	28,565	28,565	0	3,808,600	3,808,600
Form 8–K	108,424	109,465	406,590	3,904	410,494	54,212,000	520,500	54,732,500
Form ID	65,700	65,994	9,855	44	9,899	0	0	0
Sch 13G	12,500	12,546	25,577	484	26,061	42,694,200	580,320	43,274,520
Rule 20a–1	1,225	1,225	130,095	4,085	134,180	18,375,000	544,600	18,919,600
Total				53,406			7,630,420	

* The incremental burden estimate for Rule 20a–1 includes the disclosure that would be required on Schedule 14A and 14C, discussed above, with respect to funds.

E. Solicitation of Comment

We request comment on the accuracy of our estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

[332] The proposed amendment to Rule 14a–8(i)(8) is not expected to affect Form ID filings, so the burden estimates solely reflect the burden changes resulting from proposed Rule 14a–11.

[333] We estimate that 326 nominating shareholders or groups will submit nominations pursuant to Rule 14a–11, applicable state law provisions or a company's governing documents. As noted earlier, approximately 32 proxy contests were conducted in 2008. Of the 326 nominating shareholders or groups, we believe that 32 will have obtained EDGAR filer codes previously; therefore we estimate approximately 294 will need to file a Form ID. This results in an estimate of 90%.

[334] We currently estimate the burden associated with Form ID is 0.15 hours per response.

We request comment and supporting empirical data for purposes of the PRA on:

- How likely it would be for shareholders or groups to be able to meet the requirements under proposed Rule 14a–11;
- In how many instances qualifying shareholders or groups would use Rule 14a–11 to include disclosure concerning a nominee or nominees in a company's proxy materials;
- How many nominees qualifying shareholders or group might offer; and
- Whether there would be an increase in the number of shareholder proposals submitted pursuant to Rule 14a–8 that companies receive as a result of the proposed amendments.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–10–09. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–10–09, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549–0213. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

V. Cost-Benefit Analysis

A. Background

The Commission is proposing new rules that would, under certain circumstances, require companies to include in their proxy materials shareholder nominees for election as director, as well as other disclosure regarding those nominees and the nominating shareholder or group. In addition, the new rules would require companies to include in their proxy statements, under certain circumstances, shareholder proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures, or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11. The proposed rules are intended to remove certain impediments that the federal proxy process currently impose on shareholders' ability to exercise their state law right to nominate directors, and thereby reduce the costs to shareholders of exercising their rights. Below, we describe the additional disclosures shareholders would receive if the proposed rules are adopted and the direct and indirect economic effects of such new disclosures. Our discussion of the economic effects takes into account the incentives and actions of parties who would be able under the rulemaking to affect its scope and influence. These parties include shareholders, the board, and state legislatures.

Proposed Rule 14a–11 would require companies, where applicable, to include disclosures of shareholder nominations for director and disclosure about the nominating shareholder or group and the nominee or nominees in company proxy materials if, among other things, the nominating shareholder or group meets the requisite ownership threshold and has held the shares for at least one year prior to the date the shareholder provides notice on Schedule 14N of its intent to require the company to include a nominee or nominees in the company's proxy materials pursuant to Rule 14a–11. The nominating shareholder or group also would be required to represent that he or she intends to hold the shares through the date of the meeting. A nominating shareholder that includes a nominee or nominees in a company's proxy materials pursuant to Rule 14a–11 would be required to provide to the company, in its notice on Schedule 14N, disclosure similar to the disclosure required in a proxy contest.[335] Pursuant to proposed Item 7(e) of Schedule 14A (and, in the case of registered investment companies and business development companies, proposed Item 22(b)(18) of Schedule 14A), the company would be required to include the information in its proxy materials, where applicable. In addition, the proposed rules would enable shareholders to engage in limited solicitations to form nominating shareholder groups and engage in solicitations in support of their nominee or nominees without disseminating a proxy statement.[336]

The Commission also is proposing an amendment to Rule 14a–8 to narrow the exclusion in paragraph (i)(8), which addresses director elections. Under the proposed amendment, the company would not be permitted to rely on Rule 14a–8(i)(8) to omit from its proxy statement a shareholder proposal that would amend, or that requests an amendment to, a company's governing documents regarding nomination procedures, or disclosures related to shareholder nominations, although any such proposals that conflict with proposed Rule 14a–11 or state law could still be excluded from the company's proxy materials. The current procedural requirements for submitting a proposal pursuant to Rule 14a–8 would remain the same.

No additional disclosures would be required from any shareholder that submits such a proposal; however, a nominating shareholder that includes a nominee or nominees in a company's proxy materials pursuant to an applicable state law provision or the company's governing documents would be required to provide to the company, in its notice on Schedule 14N, disclosure similar to the disclosure required in a proxy contest.[337] Pursuant to proposed Item 7(f) of Schedule 14A (and, in the case of registered investment companies and business development companies, proposed Item 22(b)(19) of Schedule 14A), the company would be required to include the information in its proxy materials. We believe this information will provide shareholders with information that is useful to an informed voting decision.

The direct effect of proposed Rule 14a–11 and the related disclosure requirements would be to reduce shareholders' cost of nominating directors, which can otherwise be prohibitive since, to be successful, shareholders generally must conduct their own proxy contest. The amendments would do so without eliminating the traditional method of conducting a proxy contest. Therefore, were these amendments to become effective, the first-order economic effect would be that shareholders seeking to nominate directors may choose to move away from soliciting their own proxies for their nominees and instead require the company to include their nominee or nominees in the company proxy materials. The second-order economic effect would be that, due to the lowered

[335] *See* proposed Rule 14a–18.

[336] *See* proposed Rule 14a–2(b)(7)–(8).

[337] *See* proposed Rule 14a–19 and Rule 14n–1.

cost of effectively nominating directors, where applicable, there may be an increase in shareholder nominees for director.

The amendment to Rule 14a–8(i)(8) would narrow the exclusion and no longer permit a company to exclude shareholder proposals that would amend, or request an amendment to, a company's governing documents regarding nomination procedures, or disclosures related to shareholder nominations could result in additional shareholders being able to submit nominees for inclusion in a company's proxy materials, if approved by shareholders. Using Rule 14a–8 in this way could result in a two-year process to gain access to a company's proxy materials. The two-year process could result in different economic effects to those discussed above for proposed Rule 14a–11, depending on the proponent's success (*e.g.,* the inclusion of the proposal in the company's proxy materials and adoption of a binding bylaw proposal by appropriate shareholder vote), and the likelihood that the proponent would initiate the two-year process. The likelihood that the proponent would initiate the two-year process could be limited by the costs of the procedure arising from the additional time (including opportunity costs of holding securities where the shareholder may consider the company's board composition to be sub-optimal) and the risk of failure.[338]

The extent of the economic effect of proposed Rule 14a–11 and the related disclosure requirements may be affected by several factors. These factors include future possible actions by boards and states. They also include limits on the number of shareholder director nominees that must be disclosed in the company's proxy materials. Another relevant factor is how the requirement that a shareholder that intends to rely on proposed Rule 14a–11 may not be holding the securities it owns in the company ''for the purpose of or with the effect of changing control'' of the company would be applied in practice.

In the case of the proposed amendments to Rule 14a–8, future actions of boards may affect applicability of the rule. If Rule 14a–8(i)(8) is amended as proposed, a company would not be permitted to exclude a shareholder proposal that would amend, or that requests an amendment to, a company's governing documents to address shareholder nomination procedures or disclosures related to shareholder director nominations. It is reasonable to expect that at least some shareholders will submit this type of proposal—shareholder groups may be most likely to attempt to take this action when they perceive that the board does not currently represent their interests. Even if these proposals are no longer excludable pursuant to Rule 14a–8(i)(8), companies may submit a no-action request to exclude these shareholder proposals from the proxy statement pursuant to other procedural or substantive bases for exclusion. In contrast, we believe that applicability of proposed Rule 14a–11 is not likely to be affected by future actions of companies, because it is our understanding that under existing state laws companies generally may not prohibit shareholders from nominating directors.[339]

Future actions of the states also could affect the applicability of the proposed amendments. Proposed Rule 14a–11, for instance, would not apply to companies incorporated in states that prohibit nominations of directors by shareholders or permit companies to prohibit such nominations and where the company's governing documents do so. Additionally, the proposed rule requires that the nominee's board candidacy and membership be consistent with state law. Under Rule 14a–8, shareholder proposals must be proper subjects for action by shareholders under state law. States may have incentives to affect the director nomination process, and these incentives may lead them to consider changes that could affect the availability of proposed Rule 14a–11 or Rule 14a–8. To the extent that states change their laws, for example, to prohibit the nomination of directors by shareholders, proposed Rule 14a–11 and Rule 14a–8 would apply less broadly.

The application of the term ''changing control'' affects the shareholders that may rely on the proposed amendments to require disclosure of their board nominees. The certification by the nominating shareholder or group on Schedule 14N that it does not hold the securities it owns in the company with the purpose or effect of changing control of the company will limit the shareholders that can use the procedure in proposed Rule 14a–11. Whether this requirement applies to a nominating shareholder or group will depend, however, on the facts and circumstances of each nominating shareholder or group. It is certainly not the Commission's intent that this requirement would restrict shareholders from using the new rule merely because it is nominating directors pursuant to the new rule. Nevertheless, other factors in addition to the nomination may support a finding of control.

The economic effects of the proposed rulemaking also are affected by the requirement that shareholders cannot nominate more than a maximum of one director or 25% of the existing board. In addition to this direct requirement, the cap on shareholder nominees may have additional, indirect implications for the economic effects of proposed Rule 14a–11. First, the number of shareholder nominees that can be included in the company's proxy materials overall is limited. If one shareholder or group nominates the maximum allowable number of candidates, any other shareholder's or group's nominees are not required to be disclosed in the same proxy statement. Second, if the maximum allowable number of existing shareholder nominees is currently in place on the board, additional shareholder nominees are not required to be disclosed in the proxy statement. Third, boards seeking to limit the effect of shareholder nominated directors under the proposed rule may, in some instances, choose to expand the board size to dilute, to an extent, those directors.[340]

Below we consider the benefits and costs of these economic effects of the proposed amendments.

B. Benefits

We anticipate that the proposals, where applicable, would result in (1) a reduction in the cost to shareholders of soliciting votes in support of a nominated candidate for election to the board of directors; (2) improved disclosure of shareholder nominated director candidates; (3) potential improved board performance; and (4) enhanced ability for shareholders and companies to adopt their preferred shareholder nomination procedures.

[338] In this regard, we note that we are proposing new rules that would require a shareholder submitting a nominee or nominees pursuant to an applicable state law provision or a company's governing documents to provide disclosure similar to what is required currently in a proxy contest.

[339] We are not aware of any state laws that do so, but we seek comments on whether states currently have any prohibitions on shareholders' right to nominate directors, and whether, to the extent such a right is not explicitly allowed, shareholders are presumed to have nomination rights.

[340] As an example, a board of eight with two new shareholder-nominated directors, may expand to up to 11, diluting the influence of the shareholder-nominated directors without expanding the number of director slots for which they must place shareholder-nominated directors in the proxy statement because the proposed 25% limits in proposed Rule 14a–11 would include a provision allowing companies to round down the number of directors.

1. Reduction in Costs Related to Shareholder Nominations

Generally, a shareholder who attempts to nominate directors must conduct a proxy contest in which the shareholder is responsible for collecting information, preparing proxy materials with required disclosures concerning the director nomination, and mailing the proxy materials to each shareholder solicited. A shareholder conducting a proxy contest incurs large costs involved with preparing a proxy statement and soliciting on behalf of his or her nominee.[341] The costs can make it prohibitively expensive for shareholders to exercise their state law rights to nominate and elect directors. In addition, collective action concerns may discourage any one shareholder or group from assuming such costs for the benefit of other shareholders.[342]

Proposed new Rule 14a–11 would reduce both the direct and indirect costs of the proxy solicitation process. In particular, proposed new Rule 14a–11 would allow shareholders to avoid the direct costs of conducting a proxy contest and would mitigate collective action and free rider concerns that otherwise may deter many shareholders from engaging in a traditional proxy contest. In regard to the latter, the proposed rule changes would likely ameliorate the need for collective action among shareholders, because qualifying shareholders will have direct access to a company's proxy materials to more effectively nominate directors. To the extent that shareholders substitute use of Rule 14a–11 for engaging in traditional election contests, the proposal could also help companies avoid potential disruptions and the diversion of resources resulting from traditional proxy contests that might take place in the absence of the proposed amendments. Because the level of this benefit is affected by the extent to which shareholders make such substitutions, it is also checked by the extent that use of proposed Rule 14a–11 is not a perfect substitute for traditional election contests. For example, the proposed rule restricts the number of shareholder director nominees that a company would be required to include in its proxy materials and the proposed rule would be available only to shareholders that do not hold the securities in the company with the purpose of, or with the effect of, changing control of the company. These elements of the proposed rule impose restrictions that are not present in a traditional proxy contest. Proxy contests also would still be available where shareholders have a control intent.

According to a study of proxy contests conducted during 2003, 2004, and 2005, the average cost to a soliciting shareholder of a proxy contest is $368,000.[343] The costs included those associated with proxy advisors and solicitors, processing fees, legal fees, public relations, advertising, and printing and mailing.[344] Approximately 95% of the cost was unrelated to printing and postage.[345] The cost of printing and postage averaged approximately $18,000.[346] Based on this information, we estimate that a shareholder using proposed Rule 14a–11 to submit a nominee or nominees for director to be included in a company's proxy statement will save at least $18,000 on average and may save more as a result of being able to use the company's proxy materials to solicit other shareholders. The nominating shareholder or group may or may not engage in public relations and advertising, or engage proxy solicitors, therefore, the extent of any cost savings may be greater.

The benefits of this reduction in costs also may be enhanced to the extent that companies' governing documents are modified to allow inclusion of additional shareholder nominees for director in company proxy materials. The instances of such changes in provisions in governing documents may increase as a result of the proposed amendment to Rule 14a–8(i)(8) to preclude companies from excluding proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11.

2. Improved Disclosure of Shareholder Nominated Director Candidates

The proposed new disclosure requirements in Rules 14a–11, 14a–18, and 14n–1 would require additional information to be provided on Schedule 14N, including certifications by shareholders who submit a nominee under proposed Rule 14a–11 about the nominee's independence, and disclosure of the information similar to that currently required in a proxy contest regarding the nominating shareholder and nominee. Proposed Rules 14a–19 and 14n–1 would require similar disclosures when a shareholder uses an applicable state law provision or company's governing documents to include shareholder nominees for director in the company's proxy materials. The information provided by such certifications and disclosures would help provide transparency to shareholders in voting on shareholder nominees for director and therefore may lead to better informed voting decisions. The information also will provide consistent and comparable information about shareholder nominated candidates across companies. With respect to Rule 14a–8(i)(8), companies have been permitted to exclude proposals to establish procedures to include shareholder nominees in company proxy materials. The Commission was concerned that allowing such proposals would result in contested elections without the disclosure that otherwise would be required in a traditional proxy contest.[347] The proposed disclosure requirements are designed to address that concern.

3. Potential Improved Board Performance and Company Performance

Both proposed Rule 14a–11 and the amendments to Rule 14a–8(i)(8) may result in improved company performance, arising from improvements in board performance. First, both proposals, by increasing the chances of a shareholder-nominated director to be elected to the board, may increase the potential for incumbent directors to face closer scrutiny from outsiders. Faced with this new prospect, incumbent directors may work more diligently to signal their value to the company through efforts to improve the performance of the board and, relatedly, the company. [348] Company performance

[341] As noted in footnote 303, above, in 2008 there were at least 32 contested elections.

[342] *See, e.g.,* Lynn A. Stout, *The Mythical Benefit of Shareholder Control,* 93 Va. L. Rev. 789, 789 (2007) (''In a public company with widely dispersed share ownership, it is difficult and expensive for shareholders to overcome obstacles to collective action and wage a proxy battle to oust an incumbent board.''), *available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978775.*

[343] *See* comment letter from Automatic Data Processing, Inc. (April 20, 2006) on File No. S7–10–05.

[344] *See id.*

[345] *See id.*

[346] *See id.*

[347] *See* Shareholder Proposal Proposing Release (proposing amendments to Rule 14a–8 to ''make clear that director nominations made pursuant to [bylaw amendments concerning shareholder nominations of directors] would be subject to the disclosure requirements currently applicable to proxy contests'' and noting that such disclosure is of ''great importance'' to an informed voting decision by shareholders).

[348] The academic literature indicates the benefit to shareholders of having an independent, active and committed board of directors. *See, e.g.,* Fitch Ratings, ''Evaluating Corporate Governance'' (December 12, 2007), *available at: http://www.fitchratings.com/corporate/reports/*

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may improve to the extent some directors are replaced by other directors whose actions are better aligned with the interests of shareholders.[349] Even where incumbents are not replaced, the requirements of the rule can lead to greater accountability on the part of incumbent directors. The level of board accountability will depend on the extent to which directors see a close link between their performance and the prospect of removal.[350]

Similarly, the inclusion in company proxy materials of shareholder nominees for director under proposed Rule 14a–11, or the possibility of shareholder nominees being included in company proxy materials pursuant to shareholder-initiated amendments to a company's governing documents permitted by the proposed amendments to Rule 14a–8, may enhance the quality of the shareholders' voice and result in a board whose interests are better aligned with shareholders' interests.[351]

Second, the possibility of shareholder nominated candidates being submitted for inclusion in a company's proxy materials, as well as the possibility of the shareholder nominee's election, may lead to enhanced board performance. If the proposed rules are adopted, the responsiveness of boards may increase in an effort to alleviate concerns expressed by shareholders on certain matters and thereby avoid shareholders submitting nominees pursuant to the new rules. The board may feel a need to be more attentive to the company's operations as a result of this enhanced accountability to shareholders. In addition, having a shareholder-nominated director elected to and serving on the board may increase the transparency in boards' decision-making process, which would make it easier for shareholders to monitor the board. This increased monitoring could enhance board performance and ultimately lead to improved corporate performance.[352]

Third, increasing shareholders' access to company proxy materials for the inclusion of shareholder nominees for director may result in a larger pool of qualified director nominees to choose from. To the extent that a company does not include shareholder nominees for director in its proxy materials, thereby reducing the pool of qualified nominees, an opportunity cost may be incurred by the company and thus the shareholders. Therefore, proposed Rule 14a–11 may reduce the opportunity costs to companies and shareholders.

4. Enhanced Ability for Shareholders and Companies To Adopt Procedures

The proposed amendment to Rule 14a–8(i)(8) also may facilitate shareholders and companies working together to tailor companies' governing documents to suit the specific interests of the company and its shareholders. The proposed amendment would allow shareholders to use Rule 14a–8 to submit proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, as long as the proposal does not conflict with Rule 14a–11. This may provide shareholders a more effective voice than simply being able to recommend candidates to the nominating committee or being able to nominate candidates in person at a shareholder meeting.

The overall benefit of allowing shareholders to include director nominees in a company's proxy materials may depend on the extent to which shareholders choose to exercise their rights and on shareholders' perception of the merits of the nominees that are advanced by nominating shareholders.

C. Costs

We anticipate that the amendments, where applicable, may result in costs related to (1) potential adverse effects on company and board performance; (2) potential complexity of the proxy process; and (3) preparing the required disclosures, printing and mailing, and costs of additional solicitations.

1. Costs Related to Potential Adverse Effects on Company and Board Performance

The proposals would impose some direct costs on the companies that would be subject to the new rules. These costs would arise from potential changes to corporate behavior and potential lower board quality.

Most, if not all, companies have director nomination procedures. The proposed changes may lead some companies to incur costs associated with re-examining those procedures, especially if the company is subject to, or thinks it likely will be subject to, shareholder nominated director candidates. Companies accustomed to uncontested director elections may incur costs of adjusting their practices.[353] Further, the possibility of contested director elections may adversely influence corporate behavior. To the extent that incumbent board members may feel a greater need to respond to shareholders' various concerns, the board may incur costs in attempting to institute policies and procedures they believe will address shareholder concerns. It is possible that the time a board spends on shareholder relations could reduce the time that it would otherwise spend on strategic and long-term thinking and overseeing management, which may negatively

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report_frame.cfm?rpt_id=363502. Moreover, empirical evidence has indicated that the ability of significant shareholders to hold corporate managers accountable for activity that does not benefit investors may reduce agency costs and increase shareholder value. *See, e.g.,* Brad M. Barber, ''Monitoring the Monitor: Evaluating CalPERS' Activism'' (November 2006), *available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=890321*. *See also* Deutsche Bank, Global Equity Research, ''Beyond the Numbers: Corporate Governance in Europe,'' (March 5, 2005).

[349] *See, e.g.,* Chris Cernich, et al., ''Effectiveness of Hybrid Boards,'' IRRC Institute for Corporate Responsibility (May 2009) *available at: http://www.irrcinstitute.org/pdf/IRRC_05_09_EffectiveHybridBoards.pdf* (finding that in a study of 120 ''hybrid'' boards—boards formed when activist shareholders, through actual or threatened proxy contests, were able to elect dissident directors but not gain control of the entire board—such boards increased shareholder value at ongoing companies by 19.1% (16.6 percentage points more than peers) from the contest period through the board's one-year anniversary).

[350] The current proposal, by facilitating a reduction in the cost of nominating ''outside'' directors, would create a new threat of removal to incumbent directors, which can bring about increased accountability that would benefit investors. Economists have put forth theory and evidence on the link between incentives that are associated with accountability and performance. *See, e.g.,* Benjamin E. Hermalin and Michael S. Weisbach, ''Endogenously Chosen Board of Directors and Their Monitoring of the Board'' 88 American Economic Review 96 (1998), *available at: http://129.3.20.41/eps/mic/papers/9602/9602001.ps.gz.* Milton Harris and Artur Raviv ''Control of Corporate Decisions: Shareholders vs. Management'' (May 29, 1998), *available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=965559.*

[351] Published research has reported that when chief executive officers are more involved in the nomination of independent directors, stock price reactions to independent director appointments are significantly lower, and companies appoint fewer independent directors. *See* Anil Shivdasani & David Yermack, ''CEO Involvement in the Selection of New Board Members: An Empirical Analysis,'' 54 J. Finance 1829 (1999). This evidence is consistent with the idea that limiting total management control of the nomination process improves accountability.

[352] One benefit of corporate transparency is that it reduces information differences between the entities (*e.g.,* the board of directors and the shareholders), and hence lowers the cost of trading the firm's securities and the firm's cost of capital. *See, e.g.,* Diamond, Douglas W. and Robert E. Verrecchia, ''Disclosure, Liquidity, and the Cost of Capital,'' Journal of Finance, September 1991, 46 (4), 1325–1359. For empirical evidence, *see, e.g.,* Christian Leuz and Robert E. Verrecchia, ''The Economic Consequences of Increased Disclosure,'' Journal of Accounting Research, 2000, 38 (supplement), 91–124.

[353] *See, e.g.,* comment letter on the 2007 Proposals (SEC File Nos. S7–16–07 and S7–17–07) from the U.S. Chamber of Commerce (October 2, 2007) (''Chamber 2007'').

affect shareholder value.[354] These costs are limited by the extent to which the additional communication results in better decision-making by the board, as well as shareholders' understanding that the board's time and other resources are in scarce supply and take these considerations into account in deciding to nominate directors.

In addition, the rule proposals could, in some cases, result in lower quality boards.[355] If a shareholder nominee is elected and disruptions or polarization in boardroom dynamics occur as a result, the disruptions may delay or impair the board's decision-making process.[356] In companies in which boards are already well-functioning, dissent can be counterproductive and could delay the board's decision-making process. Such a delay or impairment in the decision-making process could constitute an indirect economic cost to shareholder value.

Companies may expend more resources on efforts to defeat the election of shareholder nominees for director. Commenters have drawn attention to the potential to turn every director election into an election contest.[357] This may be the case, for instance, if company directors determine to spend company resources to defeat shareholder nominees they believe are not in the best interests of the company (or for other reasons).[358] Such a reaction could discourage qualified board members from running. This potential would be limited by shareholders' understanding that board dynamics can be important, and that changing them may not always be beneficial. It also would be limited to the extent that company directors do not seek to substitute their judgment for the judgment of the shareholders when the question is who should comprise the board of directors.[359] We also have assumed that boards generally would be cautious in expending resources to defeat shareholder nominees insofar as incumbent board members generally are interested in the outcome of elections and in the corporation's policy in connection with opposing shareholder nominees. Nevertheless, to the extent that company directors make large expenditures to defeat shareholder nominees, those expenditures would represent a cost to shareholders. An additional cost could arise from the potential placement of directors who have insufficient experience or capabilities to serve effectively, as some commenters have suggested.[360] But to the extent that shareholders understand that experience and competence are important director qualifications, any associated costs may be limited.

Finally, the proposals could introduce a cost to shareholders to the extent that the nomination procedure is used by shareholders to promote an agenda that conflicts with other shareholders' interests. For example, it would be possible for an investor to try to maximize his private gains through board decisions at the expense of other shareholders.[361] This cost, however, is limited to the extent these nominees would be required to make certain disclosures designed to elicit their interests and relationships, and must ultimately be elected by the shareholders.[362]

2. Costs Related to Potential Complexity of Proxy Process

Under the proposed amendments, the process of determining which shareholder director nominee will be on the form of proxy and the limitations on the number of shareholder-nominated directors to appear in the company's proxy materials and eventually serve on the board may create a degree of complexity. If several shareholders or groups desire (and qualify) to nominate the maximum number of directors they are allowed to place in the company's proxy materials, only the first shareholder or group to submit a Schedule 14N will succeed. Additionally, under proposed Rule 14a–11, if the maximum allowable number of shareholder nominees is currently serving on the board, a company would not be required to include additional shareholder nominees in the company's proxy materials.

Under the proposed amendments to Rule 14a–8, shareholders would need to wait for two proxy seasons to utilize the particular procedures and disclosures adopted through a shareholder proposal under Rule 14a–8—the first season to establish a shareholder director nomination procedure and the second season to nominate and elect directors.

These sources of complexity and any uncertainty that may arise in implementing the proposed amendments could result in costs to companies, to shareholders seeking to nominate directors, and to shareholder director nominees. For example, both

[354] *See, e.g.,* Stout, footnote 342, above, at 792 (''Perhaps the most obvious [economic function of board governance] is promoting more efficient and informed business decisionmaking. It is difficult and expensive to arrange for thousands of dispersed shareholders to express their often-differing views on the best way to run the firm.''); *see generally* Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment,* 199 Harv. L. Rev. 1, 25–27 (2006) (discussing how concern for accountability may undermine decision making discretion and authority). *But see* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power,* 118 Harv. L. Rev. 833, 883 (2005) (''[M]ere recognition that back-seat driving might sometimes be counter-productive is hardly sufficient to mandate general deference to management. Such mandated deference would follow only if one assumes that shareholders are so irrational or undisciplined that they cannot be trusted to decide for themselves whether deference would best serve their interests.''). *See also,* comment letter on the 2007 Proposals (SEC File Nos. S7–16–07 and S7–17–07) from ABA 2007.

[355] *See, e.g.,* comment letter on the 2007 Proposals (SEC File Nos. S7–16–07 and S7–17–07) from Chamber 2007; Stephen M. Bainbridge, ''A Comment on the SEC Shareholder Access Proposal'' (November 14, 2003) at 17, *available at: http://ssrn.com/abstract=470121* (''The likely effects of electing a shareholder representative therefore will not be better governance. It will be an increase in affectional conflict. * * * It will be a reduction in the trust-based relationships that causes horizontal monitoring within the board to provide effective constraints on agency costs.'').

[356] *See, e.g.,* comment letter on the 2007 Proposals (SEC File Nos. S7–16–07 and S7–17–07) from the Society of Corporate Secretaries & Governance Professionals (October 5, 2007).

[357] *See* 2003 Summary of Comments and comment letters from ASCS and McKinnell, BRT.

[358] *See* 2003 Summary of Comments; *see also* comment letters from ABA; Charlotte M. Bahin, ACB; The Allstate Corporation (December 23, 2003) (''Allstate''); Ashland; Richard H. Ayers (November 18, 2003) (''Ayers''); Callaway Golf Company (December 22, 2003) (''Callaway''); Caterpillar, Inc. (December 17, 2003) (''Caterpillar''); Cigna Corporation (January 2, 2004) (''Cigna''); ConocoPhillips (October 3, 2003) (''ConocoPhillips''); Cummins, Inc. (November 23, 2003) (''Cummins''); Debevoise & Plimpton (December 17, 2003); Exelon Corporation (December 22, 2003) (''Exelon''); FirstEnergy Corp. (December 10, 2003) (''FirstEnergy''); Ganske, Kelley & Profusek; General Mills (December 19, 2003); Roger L. Howe (November 26, 2003); Reed Hundt (December 16, 2003); International Paper (December 22, 2003); Letter Type D (representing 8 individuals or entities); Letter Type H (representing 7 individuals or entities); Letter Type N (representing 38 individuals or entities); Letter Type Q (representing 4 individuals or entities); McDATA Corporation (December 22, 2003) (''McDATA''); Pfizer, Inc. (December 11, 2003) (''Pfizer''); MDU Resources (December 22, 2003) (''MDU''); Malcolm S. Morris (November 6, 2003); National Association of Corporate Directors (March 26, 2004) (''NACD''); Office Depot, Inc. (December 22, 2003); Kerr-McGee Corporation (December 22, 2003); Progress Energy (December 22, 2003); Tribune Company (December 18, 2003); and Wachtell.

[359] *Cf. Blasius Indus.* v. *Atlas Corp.,* 564 A.2d 651, 663 (Del. Ch. 1988) (stating that ''[although the] premise [that the board knows better than do the shareholders what is in the corporation's best interest] is no doubt true for any number of matters, it is irrelevant (except insofar as the shareholders wish to be guided by the board's recommendation) when the question is who should comprise the board of directors.'').

[360] *See, e.g.,* comment letter from Exelon Corporation (December 22, 2003) on the 2003 Proposal.

[361] *See, e.g,* Stout, footnote 342 above, at 794 (''[B]y making it easier for large shareholders in public firms to threaten directors, a more effective shareholder franchise might increase the risk of intershareholder ''rent-seeking'' in public companies.'').

[362] *See, e.g.,* Bebchuk, note 354 above, at 883 (arguing that proposals by special interest shareholders are generally unlikely to be adopted by the majority).

companies and shareholders could incur costs to seek legal advice in connection with shareholder nominations submitted pursuant to Rule 14a–11, the inclusion of shareholder nominees in company proxy materials, and the process for submission of a notice of intent to exclude a nominee or nominees included in the rule.[363] A company that receives a shareholder nomination for director has no obligation to make a submission under Rule 14a–11 unless it intends to exclude the nominee from its proxy materials. Companies and shareholders also could incur costs to seek legal advice in connection with shareholder proposals submitted pursuant to Rule 14a–8 and the notice of intent to exclude process related to it. A company that receives a shareholder proposal has no obligation to make a submission under Rule 14a–8 unless it intends to exclude the proposal from its proxy materials. To the extent disputes on whether to include particular nominees or proposals are not resolved internally, companies and/or shareholders might seek recourse in courts, which would increase costs.

The proposed amendments to Rule 14a–8 would no longer permit companies to exclude from their proxy materials proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11. Expanding the types of proposals permitted under Rule 14a–8 may increase the number of shareholder proposals submitted to companies. This would likely result in increased costs to the company related to reviewing and processing such proposals to determine matters such as shareholder eligibility, and whether there is a basis for excluding the proposal under Rule 14a–8. In this regard, in a comment letter submitted in connection with the 2003 Proposal, a commenter submitted information from a survey conducted about the costs associated with including a shareholder proposal in the company's proxy materials, estimating that preparation and submission of a notice of intent to exclude the proposal to the SEC regarding a shareholder proposal would average 65 hours per proposal.[364] For purposes of PRA, we estimate that shareholders will submit approximately 97 proposals regarding nomination procedures or disclosures related to director nominations to companies per year. Assuming that 90% of companies prepare and submit a notice of intent to exclude these proposals, the resulting costs to companies would result in approximately 4,241 hours and $565,500 for the services of outside professionals. Alternatively, such costs could decrease to the extent that proposed Rule 14a–8 provides a clearer indication of which proposals are excludable.

3. Costs Related to Preparing Disclosure, Printing and Mailing and Costs of Additional Solicitations

The proposals may impose additional direct costs on companies and shareholders subject to the new rules, related to the preparation of required disclosure, printing and mailing costs and costs of additional solicitations that may be undertaken as a result of including one or more shareholder nominees for director in the company proxy materials.

For purposes of the PRA analysis, we estimate that the disclosure burden of the proposed amendments to reporting companies (other than registered investment companies) is 15,652 hours of personnel time and $2,087,000 for services of outside professionals. We also estimate for purposes of the PRA analysis that the disclosure burden to shareholders of the proposed amendments will be 31,865 hours of shareholder time and $4,758,420 for services of outside professionals. For registered investment companies, we estimate for purposes of the PRA analysis that the burden of the proposed amendments will be 5,888 hours of company time and $785,000 for the services of outside professionals.

Companies would incur additional printing and mailing costs to include shareholder nominees in the company's proxy materials pursuant to Rule 14a–11, an applicable state law provision, or a company's governing documents as a result of the proposed amendment to Rule 14a–8(i)(8).[365] These incremental printing and mailing costs could include the expense of adding the name and background information of shareholder nominees for director in their proxy materials as well as the increased weight of a company's proxy materials. The printing and mailing costs would increase as the number of shareholder nominees to be included in the company proxy materials increases. As noted above, this may result in a decrease in costs to shareholders that would have to conduct proxy contests in the absence of proposed Rule 14a–11, but may increase the costs for companies. The increased costs for companies may not be as much as would otherwise result if that shareholder engaged in a proxy contest.[366]

Companies also would incur printing and mailing costs with respect to the inclusion of a shareholder proposal related to changes to the company's governing documents regarding inclusion of shareholder nominees in company proxy materials. We have two sources of information estimating such costs. According to the information provided by one commenter, the average cost to a company to print and mail one shareholder proposal in its proxy materials is $15,324 and 34 hours.[367] The responses to a questionnaire that the Commission made available in 1997 relating to 1998 amendments to Rule 14a–8, however, suggest such costs to the companies responding averaged $50,000.[368] As noted above, we believe

[363] For example, the comment letter from ASCS on the 2003 Proposal estimated based on survey results that the cost of outside counsel in connection with opposing a shareholder nominee and supporting the company's nominees for directors would be 59.4 hours and $44,460.

[364] *See* 2003 Summary of Comments; *see also* letter from McKinnell, BRT (providing information from surveys conducted of BRT and ASCS members). *See also* footnote 311, above.

[365] We note that these increased costs may be less for companies using notice and access. *See Internet Availability of Proxy Materials,* Release No. 34–55146 (January 22, 2007) (''Internet Proxy Availability Release'').

[366] One commenter on the 2003 Proposal estimated that a Rule 14a–11 contest would cost a company approximately one-third what a full proxy contest costs. *See* comment letter from Bainbridge. Based on this assumption, this commenter estimated, relying on data from a late 1980s survey, that the costs of such a contest to a public company would be $500,000. This commenter also cited data estimating companies' annual expenditures on Rule 14a–8 shareholder proposals to be $90 million. While this commenter noted that it is unlikely that there will be as many Rule 14a–11 election contests as Rule 14a–8 shareholder proposals, the commenter asserted that incumbent boards are likely to spend considerably more on opposing each Rule 14a–11 contest than on opposing a Rule 14a–8 shareholder proposal. This commenter estimated that $100 million may be an appropriate estimate for the lower boundary of the range within which Rule 14a–11's direct costs will fall. By contrast, another commenter estimated that under current rules the total cost of proxy contests for companies would exceed $15 million. *See* comment letter from McKinnell, BRT in connection with the 2003 Proposal (estimate was based on data provided in response to a 2003 survey of members of the Business Roundtable and the American Society of Corporate Secretaries).

[367] *See* ASCS letter. We also note that these increased costs may be less for companies using notice and access. *See* Internet Proxy Availability Release.

[368] In the adopting release for the amendments to Rule 14a–8 in 1998, we noted that responses to a questionnaire we made available in February 1997 suggested the average cost spent on printing costs (plus any directly related costs, such as additional postage and tabulation expenses) to include

that the proposed amendment to Rule 14a–8(i)(8) could result in an additional 38 shareholder proposals submitted annually.[369] Based on this information, for purposes of our analysis, we assume printing and mailing costs of one shareholder proposal in a company's proxy materials could be in the range of approximately $15,000 to $50,000. Assuming each of these proposals were included in company proxy materials, it could result in a total cost of approximately $570,000 to $1,900,000 for the affected companies.

The proposed rules also would present direct costs due to disclosure requirements. For example, companies that determine that they may exclude a shareholder nominee are required to provide a notice to the nominating shareholder or group regarding any eligibility or procedural deficiencies in the nomination and provide to the Commission notice of the basis for its determination.[370] Nominating shareholders or groups and the nominees also would be required to disclose information about themselves, which may be costly.[371] Most of this disclosure will be provided by the nominating shareholder or group in the notice to the company, which would be filed on new Schedule 14N. The Schedule 14N also would include information regarding the length of ownership, certifications, and other information.

We also anticipate the possibility of increased direct costs associated with additional solicitations by both companies and shareholders. Companies may increase solicitations to vote against shareholder proposals or to vote for their slate of directors. Shareholders may increase solicitations to vote for shareholder proposals, to withhold votes for a company's nominees for director, or to vote for the shareholder nominee or nominees. In addition, companies may face additional costs for solicitations if shareholders or groups submit nominees for inclusion in company proxy materials pursuant to Rule 14a–11, an applicable state law, or a company's governing documents.

D. Small Business Issuers

Based on our staff's review of Rule 14a–8 shareholder proposals, it seems that smaller companies tend to receive relatively fewer shareholder proposals. Therefore, we assume that the proposed amendment to the rule would not substantially increase the number of shareholder proposals to smaller companies and likely would have little impact on small entities. With respect to proposed Rule 14a–11, there is some indication that proxy contests may occur disproportionately at smaller companies.[372] Accordingly, we assume that proposed Rule 14a–11 is likely to have a greater effect than the proposed amendments to Rule 14a–8 on smaller companies.[373]

E. Request for Comment

We have identified certain costs and benefits imposed by these proposals. In addition to the requests for comment throughout the release on the potential impact of the proposed rules, we specifically request comment on all aspects of this cost-benefit analysis, including identification of any additional costs and benefits. We encourage commenters to identify and supply relevant data concerning the costs and benefits of the proposed amendments. We also solicit comment on how the use of electronic proxy materials[374] may reduce the costs for companies that would be required to include shareholder nominees or shareholder proposals, as well as for shareholders that otherwise would be required to conduct a proxy contest.

We also request comment on the following specific concerns:

- We solicit quantitative data to assist our assessment of the benefits and costs of enhanced shareholder access to company proxy materials. Will proposed Exchange Act Rule 14a–11 reduce shareholders' cost of nominating directors?
- We solicit quantitative data on how often shareholders meeting the proposed Rule 14a–11 thresholds would invoke the rule to propose nominees.
- We solicit quantitative data on the potential increases, if any, of shareholder proposals under Exchange Act Rule 14a–8(i)(8) as a result of these proposed rules.
- We solicit quantitative data on the incremental cost of mailing and printing company proxies that may be longer due to the inclusion of shareholder nominees. How does this compare with the cost of a stand-alone printing of the additional material, such as would be borne by a shareholder engaged in a proxy contest under the current rules?
- We solicit quantitative data on the time and cost spent by shareholders nominating directors through a proxy contest under the current rules.

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[375] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act[376] and Section 2(c) of the Investment Company Act[377] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

The proposed rules are intended to remove impediments to the exercise of shareholders' rights to nominate and elect directors and provide shareholders with information about nominating shareholders and their nominees for director. The proposed rules, if adopted, would establish a process for inclusion of shareholder nominees for director in company proxy materials pursuant to Rule 14a–11 and disclosure regarding the nominating shareholder and nominees submitted pursuant to Rule 14a–11. The proposed rules also would provide an avenue for shareholders to submit proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder

shareholder proposals in company proxy materials was approximately $50,000. The responses received may have accounted for the printing of more than one proposal.

[369] We estimated that approximately 97 proposals would be submitted regarding nomination procedures or disclosures related to nomination procedures, however, our estimate assumed that 59 proposals that otherwise would have been submitted on other governance topics would instead relate to nomination procedures or disclosures related to nomination procedures. Assuming the 59 proposals would already be accounted for in companies' costs, we estimate that 38 additional proposals would be submitted to companies annually.

[370] For purposes of the PRA analysis, we estimate these disclosure requirements would result in 2,633 burden hours of company time, and $351,000 for services of outside professionals.

[371] For purposes of the PRA analysis, we estimate the Schedule 14N disclosure requirements for shareholders submitting nominees pursuant to Rule 14a–11 or a company's governing documents would result in a total of 28,565 hours of shareholder time and $3,808,600 for services of outside professionals.

[372] *See, e.g.,* Bebchuk 2007 Article.

[373] For further discussion on the impact of the proposed amendments on smaller reporting companies, *see* discussion of Initial Regulatory Flexibility Act below.

[374] *See* Internet Proxy Availability Release.

[375] 15 U.S.C. 78w(a)(2).

[376] 15 U.S.C. 78c(f).

[377] 15 U.S.C. 80a–2(c).

nominations. In addition, the proposed rules would require disclosure of information regarding nominating shareholders or groups and any nominees submitted pursuant to an applicable state law provision or a company's governing documents, which would provide shareholders a better informed basis for deciding how to vote for nominees for election to the board of directors. Enabling shareholders to submit shareholder proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations should better reflect shareholders' preferences regarding shareholder director nomination procedures and disclosure. We expect the proposed rules to promote the efficiency of the exercise of shareholders' rights to nominate and elect directors.

We expect proposed Rule 14a–11 would increase efficiency because a shareholder will not have to engage in a formal proxy contest if the shareholder only wants to nominate a small number of directors and is not seeking control of a company's board. We also note that the proposal would increase efficiency because all or most nominees will be included on one proxy card with clear disclosure for shareholders to evaluate when deciding whether and how to grant authority to vote their shares by proxy, rather than having to evaluate more than one set of proxy materials sent by a company and an insurgent shareholder.

If a company is required to include shareholder nominees in its proxy materials, competition for board seats could increase, which might encourage or discourage qualified candidates from running. To the extent that this would discourage less-qualified candidates from running, or alternatively, would increase the quality of board members due to increased competition, investors may be more or less willing to invest in companies that receive shareholder nominees pursuant to the proposed rules. The proposed rules should improve and streamline information flow between investors and with the company, which we believe would give more direct effect to shareholder preferences regarding shareholder nominations for director.

Shareholders and the company's relationship with shareholders may benefit from the board devoting additional time to considering shareholder concerns; however, one possible adverse impact on efficiency, competition, and capital formation is that boards may devote less time to fulfilling their other responsibilities as a result. However, we believe that investors may be able to evaluate a company's board of directors more effectively and make more informed investment decisions as a result of the proposed rules. We also believe that these developments may have some positive impact on the efficiency of markets and capital formation because it may help to increase investor confidence during this time of uncertainty in our markets.

We request comment on whether the proposals, if adopted, would promote efficiency, competition and capital formation or have an impact or burden on competition. Commenters are requested to provide empirical data and other factual support for their view, if possible.

VII. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Act Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed revisions to the rules and forms under the Exchange Act and the Investment Company Act that would, under certain limited circumstances, require companies to include in their proxy materials shareholder nominees for election as director. It also relates to the proposed revisions to the rules and forms that would prohibit companies from excluding shareholder proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations. The proposals are intended to improve the ability of shareholders to receive consistent and comparable disclosure regarding, and participate meaningfully in, the nomination and election of directors.

A. Reasons for, and Objectives of, the Proposed Action

Today's proposals include features from the proposals on this topic in 2003 and 2007, and reflect much of what we learned through the public comment that the Commission has received concerning this topic over the past six years. The proposals are intended to remove impediments to shareholders' ability to participate meaningfully in the nomination and election of directors, to promote the exercise of shareholders' rights to nominate and elect directors, to open up communication between a company and its shareholders, and to provide shareholders with better information to make an informed voting decision by requiring disclosure about a nominating shareholder or group, as well as nominees for director submitted by a nominating shareholder or group. In particular, the proposed rules would create a process for long-term shareholders, or groups of long-term shareholders, with significant holdings to have their nominees for director included in company proxy materials. In addition, the proposed amendment to Rule 14a–8(i)(8) would narrow the exclusion and would not permit companies to exclude shareholder proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11, when certain conditions are met.

The rule proposals are intended to achieve the stated objectives without unduly burdening companies. We seek to limit the cost and burden on companies by limiting proposed Rule 14a–11 to nominations by shareholders who have maintained a significant continuous beneficial ownership in the company for at least one year at the time the notice of nomination is submitted. These limitations would lower the cost to companies while still improving disclosure in the company's proxy materials and thereby improve shareholders' ability to participate meaningfully in the nomination and election of directors. This increased participation may improve corporate governance by increasing director accountability and responsiveness and aligning the interests of the board and shareholders, thereby giving investors greater confidence that the board is serving the interests of shareholders. This may, in turn, enhance the value of shareholders' investments.

B. Legal Basis

We are proposing amendments to the forms and rules under the authority set forth in Sections 3(b), 13, 14, 15, 23(a) and 36 of the Securities Exchange Act of 1934, as amended, and Sections 10, 20(a) and 38 of the Investment Company Act of 1940, as amended.

C. Small Entities Subject to the Proposed Rules

The Regulatory Flexibility Act defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.'' [378] The Commission's rules define ''small business'' and ''small organization'' for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission.[379] A

[378] 5 U.S.C. 601(6).

[379] Exchange Act Rule 0–10 [17 CFR 240.0–10].

''small business'' and ''small organization,'' when used with reference to an issuer other than an investment company, generally means an issuer with total assets of $5 million as a company with total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,229 issuers that may be considered small entities.[380]

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[381] We estimate that approximately 178 registered investment companies and 34 business development companies meet this definition. The proposed rules may affect each of the approximately 212 issuers that may be considered small entities, to the extent companies and shareholders take advantage of the proposed rules.

We request comment on the number of small entities that would be impacted by our proposals, including any empirical data.

D. Reporting, Recordkeeping and Other Compliance Requirements

The proposals would, under certain circumstances, require all companies subject to the federal proxy rules, including small entities, to permit certain shareholders to submit nominees for inclusion in the company's proxy materials. A company would be required to include shareholder nominees for director in its proxy materials unless state law or a company's governing documents prohibits shareholders from nominating directors. Nominating shareholders, including nominating shareholders that are small entities, would be required to provide disclosure in proposed Schedule 14N about the nominating shareholders and the nominee, and companies would be required to include the disclosure provided by the nominating shareholder or group in the company's proxy materials.

The proposals also would permit shareholders to submit proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11. A nominating shareholder or group, including a nominating shareholder or group that is a small entity, using an applicable state law provision or a provision in the company's governing documents to submit a nomination for director would be required to provide disclosure in proposed Schedule 14N about the nominating shareholder or group and the nominee. Companies also would be required to include disclosure about the nominating shareholder or group and the nominee in the company's proxy materials when a shareholder submits a nomination for director pursuant to an applicable state law provision or a company's governing documents.

Based on our staff's review of Rule 14a–8 shareholder proposals, it seems that smaller companies tend to receive relatively fewer shareholder proposals. Therefore, we assume that the proposed amendment to the rule would not substantially increase the number of shareholder proposals to smaller companies and likely would have little impact on small entities. With respect to proposed Rule 14a–11, there is some indication that proxy contests may occur disproportionately at smaller companies.[382] Accordingly, we assume that proposed Rule 14a–11 is likely to have a greater effect than the proposed amendments to Rule 14a–8 on smaller companies.

E. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that conflict with or duplicate the proposed rules.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

- the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- the clarification, consolidation or simplification of the rule's compliance and reporting requirements for small entities;
- the use of performance rather than design standards; and
- an exemption for small entities from coverage under the proposals.

The Commission has considered a variety of reforms to achieve its regulatory objectives while minimizing the impact on small entities. As one possible approach, we considered requiring companies to include shareholder nominees for director in a company's proxy materials upon the occurrence of certain events so that the rule would apply only in situations where there was a demonstrated failure in the proxy process related to director nominations and elections in 2003. We have not taken this approach in the current proposal because we believe that it is important to remove impediments to shareholders' exercise of their right to nominate directors at all companies subject to the proxy rules rather than only at those companies where specified events have occurred. Alternatively, we considered changes to Rule 14a–8(i)(8) that would enable shareholders to have their proposals for bylaw amendments regarding the procedures for nominating directors included in the company's proxy materials provided the shareholder submitting the proposal made certain disclosures and beneficially owned more than 5% of the company's shares in 2007. We did not take this approach because we seek to provide shareholders with a more immediate and direct means of effecting change in the boards of directors of the companies in which they invest. For these reasons, as well as the reasons discussed throughout the release, we believe that today's proposals may better achieve the Commission's objectives.

We have sought comment on whether the proposed tiered approach—under which shareholders or shareholder groups at larger companies would have to satisfy a lower ownership threshold than shareholders or shareholder groups at smaller companies in order to rely on Rule 14a–11—is appropriate and workable. The effect of the tiered approach may make it less likely that shareholders at smaller companies will nominate directors under Rule 14a–11. We are not proposing different disclosure standards based on the size of the issuer. We believe the proposed uniform disclosure will be helpful to voting decisions on shareholder nominated directors at issuers of all sizes. However, we seek comment on whether the disclosure can be tiered based on the size of the company and still provide useful information to shareholders. We also have included requests for comment regarding the appropriate ownership threshold for non-accelerated filers. As noted, based on our staff's review of Rule 14a–8 shareholder proposals, it seems that smaller companies tend to receive

[380] The estimated number of reporting small entities is based on 2008 data, including the Commission's EDGAR database and Thomson Financial's Worldscope database.

[381] Rule 0–10 under the Investment Company Act [17 CFR 270.0–10] contains the applicable definition.

[382] *See, e.g.,* Bebchuk 2007 Article.

relatively fewer shareholder proposals. Therefore, we assume that the proposed rule would not substantially increase the number of shareholder proposals to smaller companies and likely would have little impact on small entities. With respect to proposed Rule 14a–11, there is some indication that proxy contests may occur disproportionately at smaller companies.[383] Accordingly, we assume that proposed Rule 14a–11 is likely to have a greater effect than the proposed amendments to Rule 14a–8 on smaller companies.

We considered the use of performance standards rather than design standards in the proposed rules. The proposal contains both performance standards and design standards. We are proposing design standards to the extent that we believe compliance with particular requirements are necessary. However, to the extent possible, we are proposing rules that impose performance standards. For example, under Rule 14a–11, shareholder nominees can provide a 500 word statement of support concerning their nominee or nominees for director, but we do not specify the content. Similarly, shareholders can propose any nomination procedures or disclosures related to shareholder nominations under the proposed amendment to Rule 14a–8(i)(8), provided they do not conflict with Rule 14a–11. By allowing shareholders to submit proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, we seek to provide shareholders and companies with a measure of flexibility to tailor the means through which they can comply with the standards.

We request comment on whether separate requirements for small entities would be appropriate. The purpose of the proposed rules is to remove impediments to the exercise of shareholders' rights to nominate and elect directors to company boards of directors and thereby enable shareholders to participate meaningfully in the nomination and election of directors at the companies in which they invest. Exempting small entities would not appear to be consistent with these goals. An exemption or separate requirements for small entities may not address the impediments to the exercise of shareholders' rights to nominate and elect directors to company boards of directors that may affect small entities as much as they would affect large companies. The establishment of any differing compliance or reporting requirements or timetables or any exemptions for smaller reporting companies may not be in keeping with the objective of the proposed rules.

G. Solicitation of Comment

We encourage comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- How our rules could achieve their objective while lowering any burden on smaller entities;
- The number of small entities that may be affected by the proposals;
- The existence or nature of the potential impact of the proposals on small entities discussed in the analysis; and
- How to quantify the impact of the proposed rules.

We solicit comments as to whether the proposed changes could have an effect that we have not considered. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposals are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VIII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[384] a rule is ''major'' if it has resulted, or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on whether our proposals would be a ''major rule'' for purposes of SBREFA. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment or innovation.

IX. Statutory Basis and Text of Proposed Amendments

The amendments are proposed pursuant to Sections 3(b), 13, 14, 15, 23(a) and 36 of the Securities Exchange Act of 1934, as amended, and Sections 10, 20(a) and 38 of the Investment Company Act of 1940, as amended.

List of Subjects

17 CFR Part 200

Freedom of information, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 232, 240, and 249

Reporting and recordkeeping requirements, Securities.

17 CFR Part 274

Investment companies, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, the Securities and Exchange Commission proposes to amend Title 17, chapter II of the Code of Federal Regulations as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart D—Information and Requests

1. The authority citation for part 200, subpart D, continues to read, in part, as follows:

Authority: 5 U.S.C. 552, as amended, 15 U.S.C. 77f(d), 77s, 77ggg(a), 77sss, 78m(F)(3), 78w, 80a–37, 80a–44(a), 80a–44(b), 80b–10(a), and 80b–11.

* * * * *

2. Add § 200.82a to read as follows:

§ 200.82a Public availability of materials filed pursuant to § 240.14a–11(f) and related materials.

Materials filed with the Commission pursuant to Rule 14a–11(f) under the Securities Exchange Act of 1934 (17 CFR 240.14a–11(f)), written communications related thereto received from any person, and each related no-action letter or other written communication issued by the staff of the Commission, shall be made available to any person upon request for inspection or copying.

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

3. The authority citation for part 232 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*, 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 *et seq.*; and 18 U.S.C. 1350.

* * * * *

4. Amend § 232.13 by revising paragraph (a)(4) introductory text (the note remains unchanged) to read as follows:

[383] *See id.*

[384] Public Law 104–121, Title II, 110 Stat. 857 (1996).

§ 232.13 Date of filing; adjustment of filing date.

(a) * * *

(4) Notwithstanding paragraph (a)(2) of this section, a Form 3, 4 or 5 (§§ 249.103, 249.104, and 249.105 of this chapter) or a Schedule 14N (§ 240.14n–101 of this chapter) submitted by direct transmission on or before 10 p.m. Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect, shall be deemed filed on the same business day.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

5. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201, *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

6. Amend § 240.13a–11 by revising paragraph (b) to read as follows:

§ 240.13a–11 Current reports on Form 8–K (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6–K (17 CFR 249.306) pursuant to § 240.13a–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such an investment company is required to file:

(1) Notice of a blackout period pursuant to § 245.104 of this chapter;

(2) Disclosure pursuant to Instruction 2 to § 240.14a–11(a) of the date by which a shareholder or shareholder group must submit the notice required pursuant to § 240.14a–11(c); or

(3) Disclosure pursuant to Instruction 3 to § 240.14a–11(b) of information concerning net assets, outstanding shares, and voting.

* * * * *

7. Amend § 240.13d–1 by revising paragraphs (b)(1)(i) and (c)(1) and adding Instruction 1 to paragraph (b)(1) and Instruction 1 to paragraph (c)(1) to read as follows:

§ 240.13d–1 Filing of Schedules 13D and 13G.

* * * * *

(b)(1) * * *

(i) Such person has acquired such securities in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to § 240.13d–3(b), other than activities solely in connection with a nomination under § 240.14a–11; and

* * * * *

Instruction 1 to paragraph (b)(1). For purposes of paragraph (b)(1)(i) of this section, the exception for activities solely in connection with a nomination under § 240.14a–11 will not be available after the election of a director nominated pursuant to § 240.14a–11.

* * * * *

(c) * * *

(1) Has not acquired the securities with any purpose, or with the effect, of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect, including any transaction subject to § 240.13d–3(b), other than activities solely in connection with a nomination under § 240.14a–11;

* * * * *

Instruction 1 to paragraph (c)(1). For purposes of paragraph (c)(1) of this section, the exception for activities solely in connection with a nomination under § 240.14a–11 will not be available after the election of a director nominated pursuant to § 240.14a–11.

* * * * *

8. Amend § 240.14a–2 by:

a. Revising paragraph (b) introductory text; and

b. Adding paragraphs (b)(7) and (b)(8).

The revision and additions read as follows:

§ 240.14a–2 Solicitations to which § 240.14a–3 to § 240.14a–15 apply.

* * * * *

(b) Sections 240.14a–3 to 240.14a–6 (other than paragraphs 14a–6(g) and 14a–6(p)), § 240.14a–8, § 240.14a–10, and §§ 240.14a–12 to 240.14a–15 do not apply to the following:

* * * * *

(7) Any solicitation by or on behalf of any shareholder in connection with the formation of a nominating shareholder group pursuant to § 240.14a–11, provided that:

(i) Each written communication includes no more than:

(A) A statement of each soliciting shareholder's intent to form a nominating shareholder group in order to nominate a director under § 240.14a–11;

(B) Identification of, and a brief statement regarding, the potential nominee or nominees or, where no nominee or nominees have been identified, the characteristics of the nominee or nominees that the shareholder intends to nominate, if any;

(C) The percentage of securities that each soliciting shareholder beneficially owns or the aggregate percentage owned by any group to which the shareholder belongs; and

(D) The means by which shareholders may contact the soliciting party.

(ii) Any soliciting material published, sent or given to shareholders in accordance with this paragraph must be filed by the shareholder with the Commission, under the registrant's Exchange Act file number, or, in the case of a registrant that is an investment company registered under the Investment Company Act of 1940, under the registrant's Investment Company Act file number, no later than the date the material is first published, sent or given to shareholders. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered. The soliciting material must include a cover page in the form set forth in Schedule 14A (§ 240.14a–101) and the appropriate box on the cover page must be marked.

(8) Any written solicitation by or on behalf of a nominating shareholder or nominating shareholder group in support of a nominee placed on the registrant's form of proxy in accordance with § 240.14a–11 or against the registrant's nominee or nominees, provided that:

(i) The soliciting party does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a shareholder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization;

(ii) Each written communication includes:

(A) The identity of each nominating shareholder and a description of his or her direct or indirect interests, by security holdings or otherwise;

(B) A prominent legend in clear, plain language advising shareholders that a shareholder nominee is or may be included in the registrant's proxy statement and to read the registrant's proxy statement when it becomes available because it includes important information (or, if the registrant's proxy statement is publicly available, advising shareholders of that fact and

encouraging shareholders to read the registrant's proxy statement because it includes important information). The legend also must explain to shareholders that they can find the registrant's proxy statement, and any other relevant documents, at no charge on the Commission's Web site; and

(iii) Any soliciting material published, sent or given to shareholders in accordance with this paragraph must be filed by the nominating shareholder with the Commission, under the registrant's Exchange Act file number, or, in the case of a registrant that is an investment company registered under the Investment Company Act of 1940, under the registrant's Investment Company Act file number, no later than the date the material is first published, sent or given to shareholders. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered. The soliciting material must include a cover page in the form set forth in Schedule 14A (§ 240.14a–101) and the appropriate box on the cover page must be marked.

9. Amend § 240.14a–4 by:

a. Revising the first sentence of paragraph (b)(2) introductory text; and

b. Adding a sentence to the end of the undesignated paragraph following paragraph (b)(2)(iv).

The revision and addition read as follows:

§ 240.14a–4 Requirements as to proxy.

* * * * *

(b) * * *

(2) A form of proxy that provides for the election of directors shall set forth the names of persons nominated for election as directors, including any person whose nomination by a shareholder or shareholder group satisfies the requirements of § 240.14a–11, an applicable state law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials. * * *

* * * * *

(iv) * * *

* * * Means to grant authority to vote for any nominees as a group or to withhold authority for any nominees as a group may not be provided if the form of proxy includes one or more shareholder nominees in accordance with § 240.14a–11, an applicable state law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

* * * * *

10. Amend § 240.14a–6 by:

a. Redesignating paragraphs (a)(4), (a)(5) and (a)(6) as paragraphs (a)(5), (a)(6) and (a)(7) respectively;

b. Adding new paragraph (a)(4);

c. Adding a sentence at the end of Note 3; and

d. Adding paragraph (p).

The revisions and additions read as follows:

§ 240.14a–6 Filing requirements.

(a) * * *

(4) A shareholder nominee for director included pursuant to § 240.14a–11, an applicable state law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

* * * * *

Note 3. * * * The inclusion of a shareholder nominee in the registrant's proxy materials pursuant to § 240.14a–11, an applicable state law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials does not constitute a ''solicitation in opposition,'' even if the registrant opposes the shareholder nominee and solicits against the shareholder nominee and in favor of a registrant nominee.

* * * * *

(p) *Solicitations subject to § 240.14a–11.* Any soliciting material that is published, sent or given to shareholders in connection with § 240.14a–2(b)(7) or (b)(8) must be filed with the Commission as specified in that section.

11. Amend § 240.14a–8 by revising paragraph (i)(8) as follows:

§ 240.14a–8 Shareholder proposals.

* * * * *

(i) * * *

(8) *Director elections:* If the proposal:

(i) Would disqualify a nominee who is standing for election;

(ii) Would remove a director from office before his or her term expired;

(iii) Questions the competence, business judgment, or character of one or more nominees or directors;

(iv) Nominates a specific individual for election to the board of directors, other than pursuant to § 240.14a–11, an applicable state law provision, or the company's governing documents; or

(v) Otherwise could affect the outcome of the upcoming election of directors.

* * * * *

12. Amend § 240.14a–9 by adding a paragraph (c) and removing the authority citation following the section to read as follows:

§ 240.14a–9 False or misleading statements.

* * * * *

(c) No nominee, nominating shareholder or nominating shareholder group, or any member thereof, shall cause to be included in a registrant's proxy materials, either pursuant to the federal proxy rules, an applicable state law provision, or a registrant's governing documents as they relate to including shareholder nominees for director in registrant proxy materials, any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

* * * * *

13. Add § 240.14a–11 to read as follows:

§ 240.14a–11 Shareholder nominations.

(a) *Applicability.* In connection with an annual meeting of shareholders (or a special meeting in lieu of the annual meeting) at which directors are elected, a registrant (other than a registrant subject to the proxy rules solely because it has a class of debt registered under Exchange Act § 12) will be required to include in its proxy statement and form of proxy the name of a person or persons nominated by a shareholder or group of shareholders for election to the board of directors and include in its proxy statement the disclosure about such nominee or nominees and the nominating shareholder or members of a nominating shareholder group that is specified in § 240.14a–18(e)–(*l*), provided that:

(1) Applicable state law or the registrant's governing documents do not prohibit the registrant's shareholders from nominating a candidate or candidates for election as a director;

(2) The nominee's candidacy or, if elected, board membership would not violate controlling state law, the registrant's governing documents, federal law, or rules of a national securities exchange or national securities association applicable to the registrant (other than rules of a national securities exchange or national securities association regarding director independence);

(3) The nominating shareholder or members of the nominating shareholder group have satisfied the eligibility

requirements in paragraph (b) of this section;

(4) All information required to be included in the notice to the registrant required pursuant to paragraph (c) of this section is so included;

(5) No representation or certification required to be included in the notice to the registrant required pursuant to paragraph (c) of this section is false or misleading in any material respect; and

(6) The provisions of paragraph (d) of this section limiting the number of nominees required to be included would not necessitate exclusion of the nominee.

Instruction 1 to paragraph (a). A nominating shareholder will not be deemed an ''affiliate'' of the registrant under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) or the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) solely as a result of nominating a candidate for director or soliciting for the election of such a director nominee or against a registrant's nominee pursuant to this section. Where a shareholder nominee is elected, and the nominating shareholder or nominating shareholder group does not have an agreement or relationship with that director, otherwise than relating to the director's nomination pursuant to § 240.14a–11, solicitation for the election of the shareholder director nominee or against a registrant's nominee, or the election of the shareholder director nominee, the nominating shareholder or nominating shareholder group will not be deemed an affiliate solely by virtue of having nominated that director.

Instruction 2 to paragraph (a). If the registrant did not hold an annual meeting the previous year, or if the date of the current year's annual meeting has been changed by more than 30 calendar days from the date of the previous year's annual meeting, the registrant must disclose pursuant to Item 5.07 of Form 8–K (§ 249.308 of this chapter) the date by which a shareholder or shareholder group must submit the notice required pursuant to paragraph (c) of this section, which date shall be a reasonable time prior to the date the registrant mails its proxy materials for the meeting.

(b) *Nominating shareholder eligibility.* A shareholder or group of shareholders nominating a person or persons must satisfy the following requirements:

(1) The shareholder individually, or the shareholder group in the aggregate, must beneficially own, as of the date the shareholder or group of shareholders provides notice to the registrant on Schedule 14N of their intent to include a nominee or nominees in the registrant's proxy materials pursuant to § 240.14a–11:

(i) For large accelerated filers as defined in § 240.12b–2, and investment companies registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) with net assets of $700 million or more, at least 1% of the registrant's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or a special meeting in lieu of the annual meeting);

(ii) For accelerated filers as defined in § 240.12b–2, and investment companies registered under the Investment Company Act of 1940 with net assets of $75 million or more but less than $700 million, at least 3% of the registrant's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or a special meeting in lieu of the annual meeting); and

(iii) For non-accelerated filers as defined in § 240.12b–2, and investment companies registered under the Investment Company Act of 1940 with net assets of less than $75 million, at least 5% of the registrant's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or a special meeting in lieu of the annual meeting); and

(2) The shareholder or each member of the shareholder group must have held the securities that are used for purposes of determining the applicable ownership threshold required by paragraph (b)(1) of this section continuously for at least one year as of the date it provides notice to the registrant on Schedule 14N and intend to continue to hold those securities through the date of the subject election of directors.

Instruction 1 to paragraph (b). In the case of a registrant other than an investment company registered under the Investment Company Act of 1940, for purposes of (b)(1) of this section, in determining the securities that are entitled to be voted on the election of directors, the nominating shareholder or nominating shareholder group may rely on information set forth in the registrant's most recent quarterly or annual report, and any current report subsequent thereto, filed with the Commission pursuant to this Act, unless the nominating shareholder or nominating shareholder group knows or has reason to know that the information contained therein is inaccurate. In the case of a registrant that is an investment company registered under the Investment Company Act of 1940, for purposes of paragraph (b)(1) of this section, in determining the securities that are entitled to be voted on the election of directors, the nominating shareholder or nominating shareholder group may rely on information set forth in the following documents, unless the nominating shareholder or nominating shareholder group knows or has reason to know that the information contained therein is inaccurate:

a. In the case of a registrant that is a series company as defined in Rule 18f–2(a) under the Investment Company Act of 1940 (§ 270.18f–2(a) of this chapter), the Form 8–K described in Instruction 3 to paragraph (b); or

b. In the case of other investment companies, the registrant's most recent annual or semi-annual report filed with the Commission on Form N–CSR (17 CFR 249.331; 17 CFR 274.128).

Instruction 2 to paragraph (b). For purposes of paragraph (b)(1) of this section, the amount of net assets of an investment company registered under the Investment Company Act of 1940 shall be the amount of net assets of the company as of the end of the company's second fiscal quarter in the fiscal year immediately preceding the fiscal year of the meeting, as disclosed in the registrant's Form N–CSR filed with the Commission, except that, for a series company (as defined in § 270.18f–2(a) of this chapter), the amount of net assets shall be the amount disclosed in the Form 8–K described in Instruction 3 to paragraph (b).

Instruction 3 to paragraph (b). If the registrant is an investment company that is a series company (as defined in § 270.18f–2(a) of this chapter), the registrant must disclose pursuant to Item 5.07 of Form 8–K (§ 249.308 of this chapter):

a. The registrant's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting; and

b. The total number of shares of the registrant outstanding and entitled to be voted (or if the votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) at an annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) as of the end of the most recent calendar quarter.

(c) *Shareholder notice.* To have a nominee included in the registrant's proxy statement and form of proxy, the nominating shareholder must provide notice to the registrant on Schedule 14N as specified by § 240.14n–1 of its intent to require that the registrant include that shareholder's nominee on the registrant's form of proxy and include

the disclosures required pursuant to § 240.14a–18. This notice must be filed with the Commission on the date provided to the registrant.

(d) *Number of shareholder nominees.* (1) The registrant will not be required to include in its proxy statement and form of proxy more than one shareholder nominee or the number of nominees that represents 25 percent of the registrant's board of directors, whichever is greater;

(2) Where the registrant has one or more directors currently serving on its board of directors who were elected as a shareholder nominee pursuant to this section, and the term of that director or directors extends past the date of the meeting of shareholders for which it is soliciting proxies, the registrant will not be required to include in the proxy statement or form of proxy more shareholder nominees than could result in the total number of directors who were elected as shareholder nominees pursuant to § 240.14a–11 and serving on the board being more than one shareholder nominee or 25 percent of the registrant's board of directors, whichever is greater; and

(3) In the event that more than one shareholder or group of shareholders is otherwise permitted to nominate a person or persons to a registrant's board of directors pursuant to § 240.14a–11, the registrant shall include in the proxy statement and form of proxy the nominee or nominees of the first nominating shareholder or nominating shareholder group from which the registrant receives timely notice as specified in paragraph (c) of this section, up to and including the total number required to be included by the registrant pursuant to this paragraph. Where the first nominating shareholder or nominating shareholder group to deliver timely notice as specified in paragraph (c) of this section does not nominate the maximum number of directors required to be included by the registrant, the nominee or nominees of the next nominating shareholder or nominating shareholder group from which the registrant receives timely notice as specified in paragraph (c) of this section would be included in the registrant's proxy materials, up to and including the total number required to be included by the registrant.

Instruction 1 to paragraph (d). Depending on board size, 25% of the board may not result in a whole number. In those instances, the maximum number of shareholder nominees for director that a registrant will be required to include in its proxy materials will be the closest whole number below 25%.

Instruction 2 to paragraph (d). If a nominee, a nominating shareholder, or any member of a nominating shareholder group has any agreement with the registrant or any affiliate of the registrant regarding the nomination of a candidate for election as a member of the registrant's board of directors, any such nominee or any nominee of such nominating shareholder or nominating shareholder group shall not be included in calculating the number of nominees required under this section.

(e) *False or misleading statements.* The registrant is not responsible for any information in the notice from the nominating shareholder or nominating shareholder group submitted as required by paragraph (c) of this section or otherwise provided by the nominating shareholder or nominating shareholder group, except where the registrant knows or has reason to know that the information is false or misleading.

(f) *Determinations regarding eligibility.* (1) Upon the registrant's receipt of a notice described in paragraph (c) of this section, the registrant shall determine whether any of the events permitting exclusion of a shareholder nominee has occurred;

(2) If the registrant determines that it will include a shareholder nominee, it must notify in writing the nominating shareholder or nominating shareholder group no later than 30 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The registrant is responsible for providing this notice in a manner that evidences its timely receipt by the nominating shareholder or each member of the nominating shareholder group;

(3) If the registrant determines that it may exclude a shareholder nominee, the registrant must notify in writing the nominating shareholder or nominating shareholder group of this determination. This notice must be postmarked or transmitted electronically no later than 14 calendar days after the registrant receives the notice required by paragraph (c) of this section. The registrant is responsible for providing this notice in a manner that evidences its timely receipt by the nominating shareholder or each member of the nominating shareholder group;

(4) The registrant's notice to the nominating shareholder or nominating shareholder group under paragraph (f)(3) of this section that it has determined that it may exclude a shareholder nominee must include an explanation of the registrant's basis for determining that it may exclude the nominee;

(5) The nominating shareholder or nominating shareholder group shall have 14 calendar days after receipt of the registrant's notice under paragraph (f)(3) of this section to respond to the registrant's notice and correct any eligibility or procedural deficiencies identified in that notice, as required by paragraph (f)(4) of this section. The nominating shareholder's or nominating shareholder group's response must be postmarked, or transmitted electronically, within the timeframe identified in the preceding sentence. The nominating shareholder or nominating shareholder group is responsible for providing the response in a manner that evidences its timely receipt;

(6) Neither the composition of the nominating shareholder group nor the shareholder nominee may be changed as a means to correct a deficiency identified in the registrant's notice to the nominating shareholder or nominating shareholder group under paragraph (f)(3) of this section—those matters must remain as they were described in the notice to the registrant submitted pursuant to paragraph (c) of this section; however, where a nominating shareholder or nominating shareholder group inadvertently submits a number of nominees that exceeds the maximum number required to be included by the registrant, the nominating shareholder or nominating shareholder group may specify which nominee or nominees are not to be included in the registrant's proxy materials;

(7) If the registrant determines that it may exclude a shareholder nominee, after providing the requisite notice of and time for the nominating shareholder or nominating shareholder group to remedy any eligibility or procedural deficiencies in the nomination, the registrant must provide notice of the basis for its determination to the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The Commission may permit the registrant to make its submission later than 80 days before the registrant files its definitive proxy statement and form of proxy if the registrant demonstrates good cause for missing the deadline;

(8) The registrant's notice to the Commission shall include:

(i) Identification of the nominating shareholder or each member of the nominating shareholder group, as applicable;

(ii) The name of the nominee;

(iii) An explanation of the registrant's basis for determining that the registrant may exclude the nominee; and

(iv) A supporting opinion of counsel when the registrant's basis for excluding a nominee relies on a matter of state law;

(9) Unless otherwise indicated in this section, the burden is on the registrant to demonstrate that it may exclude a nominee;

(10) The registrant must file its notice with the Commission and simultaneously provide a copy to the nominating shareholder or each member of the nominating shareholder group;

(11) The nominating shareholder or nominating shareholder group may submit a response to the registrant's notice to the Commission. This response must be postmarked or transmitted electronically to the Commission no later than 14 calendar days after the nominating shareholder's or nominating shareholder group's receipt of the registrant's notice to the Commission. The nominating shareholder or nominating shareholder group must provide a copy of its response to the Commission simultaneously to the registrant;

(12) The Commission staff may provide an informal statement of its views to the registrant and the nominating shareholder or nominating shareholder group;

(13) The registrant shall provide the nominating shareholder or nominating shareholder group with notice, no later than 30 calendar days before it files its definitive proxy statement and form of proxy with the Commission, of whether it will include or exclude the shareholder nominee; and

(14) The exclusion of a shareholder nominee by a registrant where that exclusion is not permissible under § 240.14a–11(a) shall be a violation of this section.

14. Amend § 240.14a–12 by removing the heading ''Instructions to § 240.14a–12''; by removing the numbers 1. and 2. of instructions 1 and 2 to § 240.14a–12 and adding in their places the phrases ''Instruction 1. to § 240.14a–12.'' and ''Instruction 2. to § 240.14a–12.'', respectively; and adding Instruction 3 to read as follows:

§ 240.14a–12 Solicitation before furnishing a proxy statement.

* * * * *

Instruction 3. to § 240.14a–12. Solicitations by a nominating shareholder or nominating shareholder group that are made in connection with a § 240.14a–11 nomination will not be deemed a solicitation in opposition subject to § 240.14a–12(c).

15. Add § 240.14a–18 to read as follows:

§ 240.14a–18 Disclosure regarding nominating shareholders and nominees submitted for inclusion in a registrant's proxy materials pursuant to § 240.14a–11.

To have a nominee included in a registrant's proxy materials pursuant to § 240.14a–11, the nominating shareholder or nominating shareholder group must provide notice to the registrant of its intent to do so on a Schedule 14N and file that notice with the Commission on the date first sent to the registrant. This notice on Schedule 14N shall be sent to the registrant by the date specified by the registrant's advance notice bylaw provision or, where no such provision is in place, no later than 120 calendar days before the date that the registrant mailed its proxy materials for the prior year's annual meeting, except that, if the registrant did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year, then the nominating shareholder or nominating shareholder group must provide and file its notice a reasonable time before the registrant mails its proxy materials, as specified by the registrant in a Form 8–K (§ 249.308 of this chapter) filed pursuant to Item 5.07 of Form 8–K. This notice must include:

(a) A representation that, to the knowledge of the nominating shareholder or nominating shareholder group, the nominee's candidacy or, if elected, board membership would not violate controlling state law, Federal law or rules of a national securities exchange or national securities association applicable to the registrant (other than rules of a national securities exchange or national securities association regarding director independence);

(b) A representation that the nominating shareholder or nominating shareholder group satisfies the conditions in § 240.14a–11(b);

(c) In the case of a registrant other than an investment company, a representation that the nominee meets the objective criteria for ''independence'' of the national securities exchange or national securities association rules applicable to the registrant, if any, or, in the case of a registrant that is an investment company, a representation that the nominee is not an ''interested person'' of the registrant as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19));

Instruction to paragraph (c). For this purpose, the nominee would be required to meet the definition of ''independence'' that generally is applicable to directors of the registrant and not any particular definition of independence applicable to members of the audit committee of the registrant's board of directors. To the extent a national securities exchange or national securities association rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board (for example, requiring that the board of directors or any group or committee of the board of directors make a determination regarding the existence of factors material to a determination of a nominee's independence), the nominee would not be required to represent that the nominee meets the subjective determination of independence as part of the shareholder nomination process.

(d) A representation that neither the nominee nor the nominating shareholder nor, where there is a nominating shareholder group, any member of the nominating shareholder group, has an agreement with the registrant regarding the nomination of the nominee;

Instruction to paragraph (d). For purposes of paragraph (d), negotiations between the nominee, the nominating shareholder or nominating shareholder group and the nominating committee or board of the registrant to have the nominee included on the registrant's proxy card as a management nominee, where those negotiations are unsuccessful, or negotiations that are limited to whether the registrant is required to include the shareholder nominee on the registrant's proxy card in accordance with § 240.14a–11, will not represent a direct or indirect agreement with the registrant.

(e) A statement from the nominee that the nominee consents to be named in the registrant's proxy statement and form of proxy and, if elected, to serve on the registrant's board of directors;

(f) A statement that the nominating shareholder or nominating shareholder group intends to continue to own the requisite shares through the date of the meeting of shareholders. Additionally, the nominating shareholder or nominating shareholder group must provide a statement regarding the nominating shareholder's or nominating shareholder group's intent with respect to continued ownership after the election.

(g) Disclosure about the nominee as would be provided in response to the disclosure requirements of Items 4(b), 5(b), 7(a), (b) and (c) and, for investment

companies, Item 22(b) of Schedule 14A (§ 240.14a–101), as applicable;

(h) Disclosure about the nominating shareholder or each member of a nominating shareholder group as would be required in response to the disclosure requirements of Items 4(b) and 5(b) of Schedule 14A, as applicable;

(i) Disclosure about whether the nominating shareholder or each member of a nominating shareholder group has been involved in any legal proceeding during the past five years, as specified in Item 401(f) of Regulation S–K (§ 229.10 of this chapter). Disclosure pursuant to this section need not be provided if provided in response to Items 4(b) and 5(b) of Schedule 14A;

Instruction 1 to paragraphs (h) and (i). Where the nominating shareholder is a general or limited partnership, syndicate or other group, the information called for in paragraphs (h) and (i) of this section must be given with respect to:

a. Each partner of the general partnership;

b. Each partner who is, or functions as, a general partner of the limited partnership;

c. Each member of the syndicate or group; and

d. Each person controlling the partner or member.

Instruction 2 to paragraphs (h) and (i). If the nominating shareholder is a corporation or if a person referred to in a., b., c. or d. of Instruction 1 to paragraphs (h) and (i) is a corporation, the information called for in paragraphs (h) and (i) of this section must be given with respect to:

a. Each executive officer and director of the corporation;

b. Each person controlling the corporation; and

c. Each executive officer and director of any corporation or other person ultimately in control of the corporation.

(j) The following information regarding the nature and extent of the relationships between the nominating shareholder or nominating shareholder group and nominee and the registrant or any affiliate of the registrant:

(1) Any direct or indirect material interest in any contract or agreement between the nominating shareholder or nominating shareholder group or the nominee and the registrant or any affiliate of the registrant (including any employment agreement, collective bargaining agreement, or consulting agreement);

(2) Any material pending or threatened litigation in which the nominating shareholder or nominating shareholder group or nominee is a party or a material participant, involving the registrant, any of its officers or directors, or any affiliate of the registrant; and

(3) Any other material relationship between the nominating shareholder or nominating shareholder group or the nominee and the registrant or any affiliate of the registrant not otherwise disclosed;

Note to paragraph (j)(3). Any other material relationship of the nominating shareholder or nominating shareholder group with the registrant or any affiliate of the registrant may include, but is not limited to, whether the nominating shareholder or nominating shareholder group currently has, or has had in the past, an employment relationship with the registrant or any affiliate of the registrant (including consulting arrangements).

(k) The Web site address on which the nominating shareholder or nominating shareholder group may publish soliciting materials, if any; and

(*l*) Any statement in support of the shareholder nominee or nominees, which may not exceed 500 words, if the nominating shareholder or nominating shareholder group elects to have such statement included in the registrant's proxy materials.

16. Add § 240.14a–19 to read as follows:

§ 240.14a–19 Disclosure regarding nominating shareholders and nominees submitted for inclusion in a registrant's proxy materials pursuant to applicable state law or a registrant's governing documents.

To have a nominee included in a registrant's proxy materials pursuant to a procedure set forth under applicable state law or the registrant's governing documents addressing the inclusion of shareholder director nominees in the registrant's proxy materials, the nominating shareholder or nominating shareholder group must provide notice to the registrant of its intent to do so on a Schedule 14N and file that notice with the Commission on the date first sent to the registrant. This notice shall be sent to the registrant by the date specified by the registrant's advance notice provision or, where no such provision is in place, no later than 120 calendar days before the date that the registrant mailed its proxy materials for the prior year's annual meeting, except that, if the registrant did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year, then the nominating shareholder or nominating shareholder group must provide notice a reasonable time before the registrant mails its proxy materials, as specified by the registrant in a Form 8–K (§ 249.308 of this chapter) filed pursuant to Item 5.07 of Form 8–K. This notice must include:

(a) A statement from the nominee that the nominee consents to be named in the registrant's proxy statement and form of proxy and, if elected, to serve on the registrant's board of directors;

(b) Disclosure about the nominee as would be provided in response to the disclosure requirements of Items 4(b), 5(b), 7(a), (b) and (c) and, for investment companies, Item 22(b) of Schedule 14A (§ 240.14a–101), as applicable;

(c) Disclosure about the nominating shareholder or each member of a nominating shareholder group as would be required in response to the disclosure requirements of Items 4(b) and 5(b) of Schedule 14A (§ 240.14a–101), as applicable;

(d) Disclosure about whether the nominating shareholder or member of a nominating shareholder group has been involved in any legal proceeding during the past five years, as specified in Item 401(f) of Regulation S–K (§ 229.10 of this chapter). Disclosure pursuant to this section need not be provided if provided in response to Items 4(b) and 5(b) of Schedule 14A (§ 240.14a–101);

Instruction 1 to paragraphs (c) and (d). Where the nominating shareholder is a general or limited partnership, syndicate or other group, the information called for in paragraphs (c) and (d) of this section must be given with respect to:

a. Each partner of the general partnership;

b. Each partner who is, or functions as, a general partner of the limited partnership;

c. Each member of the syndicate or group; and

d. Each person controlling the partner or member.

Instruction 2 to paragraphs (c) and (d). If the nominating shareholder is a corporation or if a person referred to in a., b., c. or d. of Instruction 1 to paragraphs (c) and (d) is a corporation, the information called for in paragraphs (c) and (d) of this section must be given with respect to:

a. Each executive officer and director of the corporation;

b. Each person controlling the corporation; and

c. Each executive officer and director of any corporation or other person ultimately in control of the corporation.

(e) The following information regarding the nature and extent of the relationships between the nominating shareholder or nominating shareholder group and nominee and the registrant or any affiliate of the registrant:

(1) Any direct or indirect material interest in any contract or agreement

between the nominating shareholder or nominating shareholder group or the nominee and the registrant or any affiliate of the registrant (including any employment agreement, collective bargaining agreement, or consulting agreement);

(2) Any material pending or threatened litigation in which the nominating shareholder or nominating shareholder group or nominee is a party or a material participant, involving the registrant, any of its officers or directors, or any affiliate of the registrant; and

(3) Any other material relationship between the nominating shareholder or nominating shareholder group or the nominee and the registrant or any affiliate of the registrant not otherwise disclosed; and

Instruction to paragraph (e)(3). Any other material relationship of the nominating shareholder or nominating shareholder group with the registrant or any affiliate of the registrant may include, but is not limited to, whether the nominating shareholder or nominating shareholder group currently has, or has had in the past, an employment relationship with the registrant or any affiliate of the registrant (including consulting arrangements).

(f) The Web site address on which the nominating shareholder or nominating shareholder group may publish soliciting materials, if any.

Note to § 240.14a–19. The registrant is not responsible for any information in the notice from the nominating shareholder or nominating shareholder group or otherwise provided by the nominating shareholder or nominating shareholder group, except where the registrant knows or has reason to know that the information is false or misleading.

17. Amend § 240.14a–101 by:

a. Adding on the cover page one box before the box ''Soliciting Material under § 240.14a–12'';

b. Revising Item 7 as follows:

i. Redesignating paragraph (e) as paragraph (g); and

ii. Adding new paragraph (e) and paragraph (f); and

c. Adding paragraphs (18) and (19) to Item 22(b).

The additions and revisions read as follows:

§ 240.14a–101—Schedule 14A. Information required in proxy statement.

SCHEDULE 14A INFORMATION

* * * * *

[ ] Soliciting Material under § 240.14a–11

* * * * *

Item 7. * * *

* * * * *

(e) If a shareholder nominee or nominees are submitted to the registrant and the registrant is not permitted to exclude the nominee or nominees pursuant to the provisions of § 240.14a–11, the registrant must include the disclosure required from the nominating shareholder or nominating shareholder group under § 240.14a–18(e)–(*l*) with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group.

Instruction to Item 7(e). The information disclosed pursuant to paragraph (e) of this Item will not be deemed incorporated by reference into any filing under the Securities Act of 1933, the Securities Exchange Act of 1934, or the Investment Company Act of 1940, except to the extent that the registrant specifically incorporates that information by reference.

(f) If a shareholder nominee or nominees are submitted to the registrant for inclusion in the registrant's proxy materials pursuant to a procedure set forth under applicable state law or the registrant's governing documents providing for the inclusion of shareholder director nominees in the registrant's proxy materials, the registrant must include the disclosure required from the nominating shareholder or nominating shareholder group under § 240.14a–19(a) through (f) with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group.

Instruction to Item 7(f). The information disclosed pursuant to paragraph (f) of this Item will not be deemed incorporated by reference into any filing under the Securities Act of 1933, the Securities Exchange Act of 1934, or the Investment Company Act of 1940, except to the extent that the registrant specifically incorporates that information by reference.

* * * * *

Item 22. Information required in investment company proxy statement.

* * * * *

(b) * * *

(18) If a shareholder nominee or nominees are submitted to the Fund and the Fund is not permitted to exclude the nominee or nominees pursuant to the provisions of § 240.14a–11, the Fund must include the disclosure required from the nominating shareholder or nominating shareholder group under § 240.14a–18(e) through (*l*) with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group.

Instruction to paragraph (b)(18). The information disclosed pursuant to paragraph (b)(18) of this Item will not be deemed incorporated by reference into any filing under the Securities Act of 1933, the Securities Exchange Act of 1934, or the Investment Company Act of 1940, except to the extent that the Fund specifically incorporates that information by reference.

(19) If a shareholder nominee or nominees are submitted to the Fund for inclusion in the Fund's proxy materials pursuant to a procedure set forth under applicable state law or the Fund's governing documents providing for the inclusion of shareholder director nominees in the Fund's proxy materials, the Fund must include the disclosure required from the nominating shareholder or nominating shareholder group under § 240.14a–19(a) through (f) with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group.

Instruction to paragraph (b)(19). The information disclosed pursuant to paragraph (b)(19) of this Item will not be deemed incorporated by reference into any filing under the Securities Act of 1933, the Securities Exchange Act of 1934, or the Investment Company Act of 1940, except to the extent that the Fund specifically incorporates that information by reference.

* * * * *

18. Amend Part 240 by adding an undesignated center heading and §§ 240.14n–1 through 240.14n–3 and § 240.14n–101 to read as follows:

Regulation 14N: Filings Required by Certain Nominating Shareholders

§ 240.14n–1 Filing of Schedule 14N.

(a) A shareholder or group of shareholders that submits a nominee or nominees in accordance with § 240.14a–11 or a procedure set forth under applicable state law or a registrant's governing documents providing for the inclusion of shareholder director nominees in the registrant's proxy materials shall file with the Commission a statement containing the information required by Schedule 14N (§ 240.14n–101) and simultaneously provide the notice on Schedule 14N to the registrant.

(b)(1) Whenever two or more persons are required to file a statement containing the information required by Schedule 14N (§ 240.14n–101), only one statement need be filed. The statement must identify all such persons, contain the required information with regard to each such person, indicate that the statement is filed on behalf of all such persons, and include, as an exhibit,

their agreement in writing that the statement is filed on behalf of each of them. Each person on whose behalf the statement is filed is responsible for the timely filing of that statement and any amendments thereto, and for the completeness and accuracy of the information concerning such person contained therein; such person is not responsible for the completeness or accuracy of the information concerning the other persons making the filing, unless such person knows or has reason to know that the information is inaccurate.

(2) If the group's members elect to make their own filings, each filing should identify all members of the group but the information provided concerning the other persons making the filing need only reflect information which the filing person knows or has reason to know.

§ 240.14n–2 Filing of amendments to Schedule 14N.

(a) If any material change occurs in the facts set forth in the Schedule 14N (§ 240.14n–101) required by § 240.14n–1(a), the person or persons who were required to file the statement shall promptly file or cause to be filed with the Commission an amendment disclosing that change.

(b) An amendment shall be filed within 10 calendar days of the final results of the election being announced by the registrant stating the nominating shareholder's or the nominating shareholder group's intention with regard to continued ownership of their shares.

§ 240.14n–3 Dissemination.

One copy of Schedule 14N (§ 240.14n–101) filed pursuant to §§ 240.14n–1 and 240.14n–2 shall be sent to the issuer of the security at its principal executive office by registered or certified mail. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered.

§ 240.14n–101 Schedule 14N—Information to be included in statements filed pursuant to § 240.14n–1 and amendments thereto filed pursuant to § 240.14n–2.

Securities and Exchange Commission, Washington, DC 20549

Schedule 14N

Under the Securities Exchange Act of 1934

(Amendment No._)*

(Name of Issuer)

(Title of Class of Securities)

(CUSIP Number)

[ ] Notice of Submission of a Nominee or Nominees in Accordance with § 240.14a–11

[ ] Notice of Submission of a Nominee or Nominees in Accordance with Procedures Set Forth Under Applicable State Law or the Registrant's Governing Documents

*The remainder of this cover page shall be filled out for a reporting person's initial filing on this form, and for any subsequent amendment containing information which would alter the disclosures provided in a prior cover page.

The information required in the remainder of this cover page shall not be deemed to be ''filed'' for the purpose of Section 18 of the Securities Exchange Act of 1934 (''Act'') or otherwise subject to the liabilities of that section of the Act but shall be subject to all other provisions of the Act.

(1) Names of reporting persons

(2) Amount of securities beneficially owned and entitled to be voted on the election of directors held by each reporting person:

(3) Percent of securities entitled to be voted on the election of directors represented by amount in Row (2):

Instructions for Cover Page:

(1) *Names of Reporting Persons*—Furnish the full legal name of each person for whom the report is filed—*i.e.,* each person required to sign the schedule itself—including each member of a group. Do not include the name of a person required to be identified in the report but who is not a reporting person.

(2) and (3) *Amount Held by Each Reporting Person*—Rows (2) and (3) are to be completed in accordance with the provisions of Item 3 of Schedule 14N. All percentages are to be rounded off to the nearest tenth (one place after decimal point).

Notes: Attach as many copies of the second part of the cover page as are needed, one reporting person per page.

Filing persons may, in order to avoid unnecessary duplication, answer items on Schedule 14N by appropriate cross references to an item or items on the cover page(s). This approach may only be used where the cover page item or items provide all the disclosure required by the schedule item. Moreover, such a use of a cover page item will result in the item becoming a part of the schedule and accordingly being considered as ''filed'' for purposes of section 18 of the Act or otherwise subject to the liabilities of that section of the Act.

Special Instructions for Complying With Schedule 14N

Under Sections 14 and 23 of the Securities Exchange Act of 1934 and the rules and regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this schedule. The information will be used for the primary purpose of determining and disclosing the holdings and interests of a nominating shareholder or nominating shareholder group. This statement will be made a matter of public record. Therefore, any information given will be available for inspection by any member of the public.

Because of the public nature of the information, the Commission can use it for a variety of purposes, including referral to other governmental authorities or securities self-regulatory organizations for investigatory purposes or in connection with litigation involving the Federal securities laws or other civil, criminal or regulatory statutes or provisions. Failure to disclose the information requested by this schedule may result in civil or criminal action against the persons involved for violation of the Federal securities laws and rules promulgated thereunder.

Instructions

The item numbers and captions of the items shall be included but the text of the items is to be omitted. The answers to the items shall be prepared so as to indicate clearly the coverage of the items without referring to the text of the items. Answer every item. If an item is inapplicable or the answer is in the negative, so state.

Item 1(a). Name of Registrant

Item 1(b). Address of Registrant's Principal Executive Offices

Item 2(a). Name of Person Filing

Item 2(b). Address or Principal Business Office or, if None, Residence

Item 2(c). Title of Class of Securities

Item 2(d). CUSIP No.

Item 3. Ownership

Provide the following information regarding the aggregate number and percentage of the securities of the registrant identified in Item 1.

(a) Amount of securities beneficially owned and entitled to be voted on the election of directors at the meeting:.

(b) Percent of securities entitled to be voted on the election of directors at the meeting:__.

Item 4. Notice of Dissolution of Group

Notice of dissolution of a nominating shareholder group or the termination of a shareholder nomination shall state the date of the dissolution or termination.

Item 5. Statement of Ownership From a Nominating Shareholder or Each Member of a Nominating Shareholder Group Submitting This Notice Pursuant to § 240.14a–11

(a) If the nominating shareholder, or each member of the nominating shareholder group, is the registered holder of the shares, please so state. Otherwise, attach to Schedule 14N a written statement from the ''record'' holder of the nominating shareholder's shares (usually a broker or bank) verifying that, at the time of submitting the shareholder notice to the registrant on Schedule 14N, the nominating shareholder continuously held the securities being used to satisfy the applicable ownership threshold for a period of at least one year. In the alternative, if the nominating shareholder has filed a Schedule 13D, Schedule 13G, Form 3, Form 4, and/or Form 5, or amendments to those documents, so state and attach a copy or incorporate that filing by reference.

(b) Provide a written statement that the nominating shareholder, or each member of the nominating shareholder group, intends to continue to own the requisite shares through the date of the meeting of shareholders. Additionally, at the time this Schedule is filed, the nominating shareholder or each member of the nominating shareholder group must provide a written statement regarding the nominating shareholder's or nominating shareholder group member's intent with respect to continued ownership after the election.

Item 6. Representations and Disclosure Required by § 240.14a–18

If a nominating shareholder or nominating shareholder group is submitting this notice in connection with the inclusion of a shareholder nominee or nominees for director in the company's proxy materials pursuant to § 2 40.14a–11, provide the information required by § 240.14a–18.

Item 7. Disclosure Required by § 240.14a–19

If a nominating shareholder or nominating shareholder group is submitting this notice in connection with the inclusion of a shareholder nominee or nominees for director in the company's proxy materials pursuant to a procedure set forth under applicable state law or the registrant's governing documents, provide the information required by § 240.14a–19.

Item 8. Certification for Nominating Shareholder Notices Submitted Under § 240.14a–11

The following certification shall be provided by the filing person, or in the case of a group, each filing person whose securities are being aggregated for purposes of meeting the ownership threshold set out in § 240.14a–11(b):

By signing below I certify that, to the best of my knowledge and belief, the securities referred to above are not held for the purpose of or with the effect of changing control of the issuer of the securities or to gain more than a limited number of seats on the board.

Signature

After reasonable inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

Dated: _____

Signature: _____

Name/Title: _____

The original statement shall be signed by each person on whose behalf the statement is filed or his authorized representative. If the statement is signed on behalf of a person by his authorized representative other than an executive officer or general partner of the filing person, evidence of the representative's authority to sign on behalf of such person shall be filed with the statement, *provided, however,* that a power of attorney for this purpose which is already on file with the Commission may be incorporated by reference. The name and any title of each person who signs the statement shall be typed or printed beneath his signature.

Attention: Intentional misstatements or omissions of fact constitute Federal criminal violations (see 18 U.S.C. 1001).

19. Amend § 240.15d–11 by revising paragraph (b) to read as follows:

§ 240.15d–11 Current reports on Form 8–K (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6–K (17 CFR 249.306) pursuant to § 240.15d–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such an investment company is required to file:

(1) Notice of a blackout period pursuant to § 245.104 of this chapter;

(2) Disclosure pursuant to Instruction 2 to § 240.14a–11(a) of the date by which a nominating shareholder or nominating shareholder group must submit the notice required pursuant to § 240.14a–11(c); or

(3) Disclosure pursuant to Instruction 3 to § 240.14a–11(b) of information concerning net assets, outstanding shares, and voting.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

20. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.,* 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

21. Amend Form 8–K (referenced in § 249.308) by:

a. Adding a sentence at the end of General Instruction B.1;

b. Removing the heading ''Section 5.06'' and adding in its place ''Item 5.06''; and

c. Adding Item 5.07.

The additions read as follows:

Note: The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8–K

* * * * *

GENERAL INSTRUCTIONS

* * * * *

B. Events to be Reported and Time for Filing Reports

1. * * * A report pursuant to Item 5.07 is to be filed within four business days after the registrant determines the anticipated meeting date.

* * * * *

Item 5.07 Shareholder Nominations Pursuant to Exchange Act Rule 14a–11

(a) If the registrant did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 calendar days from the date of the previous year's meeting, then the registrant is required to disclose the date by which a nominating shareholder or nominating shareholder group must submit the notice required pursuant to § 240.14a–11(c), which date shall be a reasonable time before the registrant mails its proxy materials for the meeting.

(b) If the registrant is a series company as defined in Rule 18f–2(a) under the Investment Company Act of 1940 (17 CFR 270.18f–2), then the

registrant is required to disclose in connection with the election of directors at an annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders):

(1) The registrant's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting; and

(2) The total number of shares of the registrant outstanding and entitled to be voted (or if the votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) at such meeting of shareholders as of the end of the most recent calendar quarter.

* * * * *

Dated: June 10, 2009.

By the Commission.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–14090 Filed 6–17–09; 8:45 am]

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Thursday,
June 18, 2009

Part III

Securities and Exchange Commission

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules on Annual and Special Reporting by Registered Public Accounting Firms; Notice

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60107; File No. PCAOB–2008–04]

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules on Annual and Special Reporting by Registered Public Accounting Firms

June 12, 2009.

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the ''Act''), notice is hereby given that on June 10, 2008, the Public Company Accounting Oversight Board (the ''Board'' or ''PCAOB'') filed with the Securities and Exchange Commission (the ''Commission'' or ''SEC'') the proposed rules described in Items I and II below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rules from interested persons.

I. Board's Statement of the Terms of Substance of the Proposed Rule

On June 10, 2008, the Board adopted rules consisting of eight new rules (PCAOB Rules 2200–2207) concerning annual and special reporting by registered public accounting firms, instructions to two forms to be used for such reporting (Form 2 and Form 3), and related amendments to existing Board Rules. The proposed rules text is set out below.

Section 2. Registration and Reporting

Part 2—Reporting

2200. Annual Report

Each registered public accounting firm must file with the Board an annual report on Form 2 by following the instructions to that form. Unless directed otherwise by the Board, the registered public accounting firm must file such annual report and exhibits thereto electronically with the Board through the Board's Web-based system.

2201. Time for Filing of Annual Report

Each registered public accounting firm must file the annual report on Form 2 no later than June 30 of each year, provided, however, that a registered public accounting firm that has its application for registration approved by the Board in the period between and including April 1 and June 30 of any year shall not be required to file an annual report in that year.

Note: Pursuant to Rule 1002, in any year in which the filing deadline falls on a Saturday, Sunday, or federal legal holiday, the deadline for filing the annual report shall be the next day that is not a Saturday, Sunday, or federal legal holiday.

2202. Annual Fee

Each registered public accounting firm must pay an annual fee to the Board on or before July 31 of any year in which the firm is required to file an annual report on Form 2. The Board will, from time to time, announce the current annual fee. No portion of the annual fee is refundable.

2203. Special Reports

(a) A registered public accounting firm must file a special report on Form 3 to report information to the Board as follows—

(1) Upon the occurrence, on or after [effective date of this rule], of any event specified in Form 3, a registered public accounting firm must report the event in a special report filed no later than thirty days after the occurrence of the event;

(2) No later than thirty days after receiving notice of Board approval of its application for registration, a registered public accounting firm that becomes registered after [effective date of this rule] must file a special report to report any event specified in Form 3 that occurred after the date used by the firm for purposes of General Instruction 9 to Form 1 and before the date that the Board approved the firm's registration; and

(3) No later than [date thirty days after the effective date of this rule], a registered public accounting firm that is registered as of [effective date of this rule], must file a special report to report, to the extent applicable to the firm, certain information described in General Instruction 4 to Form 3 and current as of [effective date of this rule].

(b) A registered public accounting firm required to file a special report shall do so by filing with the Board a special report on Form 3 in accordance with the instructions to that form. Unless directed otherwise by the Board, a registered public accounting firm must file such special report and exhibits thereto electronically with the Board through the Board's Web-based system.

2204. Signatures

Each signatory to a report on Form 2 or Form 3 shall manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic submission. Such document shall be executed before or at the time the electronic submission is made and shall be retained by the filer for a period of seven years. Upon request, an electronic filer shall provide to the Board or its staff a copy of all documents retained pursuant to this Rule.

2205. Amendments

Amendments to a filed report on Form 2 or Form 3 shall be made by filing an amended report on Form 2 or Form 3 in accordance with the instructions to those forms concerning amendments. Amendments shall not be filed to update information in a report that was correct at the time the report was filed, but only to correct information that was incorrect at the time the report was filed or to provide information that was omitted from the report and was required to be provided at the time the report was filed.

2206. Date of Filing

(a) An annual report shall be deemed to be filed on the date on which the registered public accounting firm submits a Form 2 in accordance with Rule 2200 that includes the signed certification required in Part X of Form 2.

(b) A special report on Form 3 shall be deemed to be filed on the date that the registered public accounting firm submits a Form 3 in accordance with Rule 2203 that includes the signed certification required in Part VIII of Form 3.

2207. Assertions of Conflicts With Non-U.S. Laws

If, in a report on Form 2 or Form 3, a foreign registered public accounting firm omits any information or affirmation required by the instructions to the relevant form on the ground that it cannot provide such information or affirmation on the form filed with the Board without violating non-U.S. law, the foreign registered public accounting firm shall—

(a) In accordance with the instructions to the form—

(1) Indicate that it has omitted required information or affirmations on the ground that it cannot provide such information or affirmations on the form filed with the Board without violating non-U.S. law;

(2) Identify all Items on the form with respect to which it has withheld any required information or affirmation on that ground; and

(3) Represent that, with respect to all such omitted information or affirmations, the foreign registered public accounting firm has satisfied the requirements of paragraph (b) of this Rule and has in its possession the materials required by paragraph (c) of this Rule;

(b) Before filing the form with the Board, make reasonable, good faith efforts, where not prohibited by law, to seek any consents or waivers that would be sufficient to allow it to provide the required information or affirmation on the form filed with the Board without violating non-U.S. law;

(c) Have in its possession, before the date on which the foreign registered public accounting firm files the form with the Board and for a period of seven years thereafter—

(1) An electronic version of the form that includes all information required by the instructions to the form (including certification and signature) and a manually signed signature page or other document that would satisfy the requirement of Rule 2204 if that version of the form were filed with the Board;

(2) A copy of the provisions of non-U.S. law that the foreign registered public accounting firm asserts prohibit it from providing the required information or affirmations on the form filed with the Board, and an English translation of any such provisions that are not in English;

(3) A legal opinion, in English, addressed to the foreign registered public accounting firm and that the foreign registered public accounting firm has reason to believe is current with respect to the relevant point of law, that the firm cannot provide the omitted information or affirmation on the form filed with the Board without violating non-U.S. law;

(4) A written representation, in English, that the Firm has made reasonable efforts, and a written description of those efforts, to obtain consents or waivers that would be sufficient to allow it to provide the required information or affirmation on the form filed with the Board, manually signed by the same person whose signature appears in the certification portion of the form, and indicating that the signer has reviewed the description and that the description is, based on the signer's knowledge, accurate and does not contain any untrue statements of material fact or omit to state a material fact necessary to make the statements made not misleading, and dated—

(i) For Form 2, after the end of the reporting period and no later than the date of the Form 2 filing; and

(ii) For Form 3, after the date of the reportable event and no later than the date of the Form 3 filing;

(d) Not later than the fourteenth day after any request by the Board or by the Director of the Division of Registration and Inspections for any of the documents described in subparagraphs (2)–(4) of paragraph (c) of this Rule, file an amended report on Form 2 or Form 3 including, as an exhibit to the amended report, the requested documents; and

(e) Not later than the fourteenth day after any request by the Board for any of the information included in the document described in subparagraph (1) of paragraph (c) of this Rule, file an amended report on Form 2 or Form 3 including the requested information.

Note: Rule 2207(c)(1) does not require that the version of the form maintained by the firm include any affirmation required by Part IX of Form 2. If the firm withholds any such affirmation, however, the asserted legal conflict must be addressed in accordance with subparagraphs (2)–(4) of Rule 2207(c).

Note: Rule 2207(c)(1) does not require a firm to include on the form maintained by the firm any information (1) that the firm does not possess, and (2) as to which the firm asserts that the firm would violate non-U.S. law by requiring another person to provide the information to the firm. The asserted legal conflict that prevents the firm from requiring another person to provide the information to the firm, however, must be addressed in accordance with subparagraphs (2)–(4) of Rule 2207(c).

Note: The ''reasonable efforts'' element of Rule 2207(c)(4) does not require a firm to renew efforts to seek consents or waivers from parties who have previously declined to provide consents or waivers with respect to disclosure of similar types of information and does not require a firm to seek consents or waivers from parties other than firm personnel and firm clients.

Forms

Form 2—Annual Report Form

General Instructions

1. Submission of this Report. A *registered public accounting firm* must use this Form to file with the *Board* the annual report required by Section 102(d) of the *Act* and Rule 2200 and to file any amendments to an annual report. Unless otherwise directed by the *Board,* the Firm must file this Form, and all exhibits to this Form, electronically with the *Board* through the *Board's* Web-based system.

2. Defined Terms. The definitions in the *Board's rules* apply to this Form. Italicized terms in the instructions to this Form are defined in the *Board's rules.* In addition, as used in the instructions to this Form, the term ''the Firm'' means the *registered public accounting firm* that is filing this Form with the *Board.*

3. When Report is Considered Filed. Annual reports on this Form are required to be filed each year on or before June 30, subject to the qualification in Rule 2201 concerning any firm that has its application for registration approved by the *Board* in the period between and including April 1 and June 30. An annual report is considered filed when the Firm has submitted to the *Board* a Form 2 in accordance with Rule 2200 that includes the signed certification required in Part X of Form 2.

4. Period Covered by this Report. Annual reports on this Form shall cover a 12-month period from April 1 to March 31, subject to the qualification in Part VIII of Form 2 relating to the first annual report filed by a firm that becomes registered after [effective date of Rule 2201]. In the instructions to this Form, this is the period referred to as the ''reporting period.''

5. Amendments to this Report. Amendments shall not be filed to update information in a filed Form 2 that was correct at the time the Form was filed, but only to correct information that was incorrect at the time the Form was filed or to provide information that was omitted from the Form and was required to be provided at the time the Form was filed. When filing a Form 2 to amend an earlier filed Form 2, the Firm must supply not only the corrected or supplemental information, but must include in the amended Form 2 all information, affirmations, and certifications that were required to be included in the original Form 2. The Firm may access the originally filed Form 2 through the *Board's* Web-based system and make the appropriate amendments without needing to re-enter all other information.

Note: The *Board* will designate an amendment to an annual report as a report on ''Form 2/A.''

6. *Rules* Governing this Report. In addition to these instructions, the *rules* contained in Part 2 of Section 2 of the *Board's rules* govern this Form. Please read these *rules* and the instructions carefully before completing this Form.

7. Requests for Confidential Treatment. The Firm may, by marking the Form in accordance with the instructions provided, request confidential treatment of any information submitted in Part VI, Part VII, or Exhibit 99.3 of this Form that has not otherwise been publicly disclosed and that either contains information reasonably identified by the Firm as proprietary information or that is protected from public disclosure by applicable laws related to confidentiality of proprietary, personal, or other information. See Rule 2300. *Foreign registered public* accounting firm's may also request confidential

treatment for Item 3.2 and Exhibit 3.2, though U.S. firms may not do so. If the Firm requests confidential treatment, it must identify the information in Part VI, Part VII, or Exhibit 99.3 (or, for a *foreign registered public accounting firm,* Item 3.2 and Exhibit 3.2) that it desires to keep confidential, and include, as Exhibit 99.1 to this Form, an exhibit that complies with the requirements of Rule 2300(c)(2). The *Board* will determine whether to grant confidential treatment requests on a case-by-case basis. If the Firm fails to include Exhibit 99.1, or includes an Exhibit 99.1 that fails to comply with Rule 2300(c)(2), the request for confidential treatment may be denied solely on the basis of that failure.

8. Assertions of Conflicts with Non-U.S. Law. If the Firm is a *foreign registered public accounting firm,* the Firm may, unless otherwise directed by the *Board* pursuant to Rule 2207(e), decline to provide certain information and affirmations required by this Form if the Firm could not provide such information or affirmations without violating non-U.S. law and the Firm proceeds in accordance with Rule 2207. The Firm may withhold responsive information and affirmations on that basis from any Part of the Form other than Parts I, II, and X and Items 3.1.a, 3.1.b, 3.1.d, and 4.1. If the firm withholds responsive information or affirmations, the Firm must indicate, in accordance with the instructions in the relevant Part of the Form, the particular Items with respect to which the Firm has withheld responsive information or a required affirmation. The Firm may not use the Form to make any general assertion that a particular requirement may conflict with non-U.S. law, but only to indicate that, on the basis of an asserted conflict, the Firm has in fact withheld from this Form required information or a required affirmation.

9. Language. Information submitted as part of this Form, including any exhibit to this Form, must be in the English language.

Part I—Identity of the Firm and Contact Persons

In Part I, the Firm should provide information that is current as of the date of the certification in Part X.

Item 1.1 Name of the Firm

a. State the legal name of the Firm.

b. If different than its legal name, state the name or names under which the Firm issues *audit reports,* or issued any *audit report* during the reporting period.

c. If the Firm's legal name at the beginning of the reporting period was different than the name provided under Item 1.1.a, state that legal name and any other legal name the Firm had during the reporting period. Include the legal name of any *registered public accounting firm* that merged into, or was acquired by, the Firm during the reporting period.

Item 1.2 Contact Information of the Firm

a. State the physical address (and, if different, mailing address) of the Firm's headquarters office.

b. State the telephone number and facsimile number of the Firm's headquarters office. If available, state the Web site address of the Firm.

Item 1.3 Primary Contact With the Board

State the name, business title, physical business address (and, if different, business mailing address), business telephone number, business facsimile number, and business e-mail address of a partner or authorized officer of the Firm who will serve as the Firm's primary contact with the *Board,* including for purposes of the annual report filed on this Form and any special reports filed on Form 3.

Part II—General Information Concerning This Report

Item 2.1 Reporting Period

State the reporting period covered by this report.

Note: The reporting period, which the Firm should enter in Item 2.1, is the period beginning on April 1 of the year before the year in which the annual report is required to be filed and ending March 31 of the year in which the annual report is required to be filed. That is the period referred to where this Form refers to the ''reporting period.'' Note, however, the special instruction at the beginning of Part VIII concerning the first annual report filed by certain firms.

Item 2.2 Amendments

If this is an amendment to a report previously filed with the *Board*—

a. Indicate, by checking the box corresponding to this item, that this is an amendment.

b. Identify the specific Item numbers of this Form (other than this Item 2.2) as to which the Firm's response has changed from that provided in the most recent Form 2 or amended Form 2 filed by the Firm with respect to the reporting period.

Part III—General Information Concerning the Firm

Item 3.1 The Firm's Practice Related to the Registration Requirement

a. Indicate whether the Firm issued any *audit report* with respect to an *issuer* during the reporting period.

b. In the event of an affirmative response to Item 3.1.a, indicate whether the *issuers* with respect to which the Firm issued *audit reports* during the reporting period were limited to employee benefit plans that file reports with the *Commission* on Form 11–K.

c. In the event of a negative response to Item 3.1.a, indicate whether the Firm *played a substantial role in the preparation or furnishing of an audit report* with respect to an *issuer* during the reporting period.

d. In the event of a negative response to both Items 3.1.a and 3.1.c, indicate whether, during the reporting period, the Firm issued any document with respect to financial statements of a non-*issuer* broker-dealer in which the Firm either set forth an opinion on the financial statements or asserted that no such opinion can be expressed.

Item 3.2 Fees Billed to Issuer Audit Clients

a. Of the total fees billed by the Firm to all clients for services that were rendered in the reporting period, state the percentage (which may be rounded, but no less specifically than to the nearest five percent) attributable to fees billed to *issuer audit* clients for—

1. *Audit services;*
2. *Other accounting services;*
3. *Tax services;* and
4. *Non-audit services.*

b. Indicate, by checking the appropriate box, which of the following two methods the Firm used to calculate the percentages reported in Item 3.2.a—

1. The Firm used as a denominator the total fees billed to all clients for services rendered during the reporting period and used as numerators (for each of the four categories) total fees billed to *issuer audit* clients for the relevant services rendered during the reporting period.

2. The Firm used as a denominator the total fees billed to all clients in the Firm's fiscal year that ended during the reporting period and used as numerators (for each of the four categories) total *issuer audit* client fees as determined by reference to the fee amounts disclosed to the *Commission* by those clients for each client's fiscal year that ended during the reporting period (including, for clients who have not made the required *Commission* filings, the fee amounts required to be disclosed).

c. If the Firm has used a reasonable method to estimate the components of the calculations described in Item 3.2.b, rather than using the specific data, check this box and attach Exhibit 3.2 briefly describing the reasons for doing so and the methodology used in making those estimates.

Note: In responding to Item 3.2, careful attention should be paid to the definitions of the italicized terms, which are found in *Board Rules* 1001(i)(iii) (*issuer*), 1001(a)(v) (*audit*), 1001(a)(vii) (*audit services*), 1001(o)(i) (*other accounting services*), 1001(t)(i) (*tax services*), and 1001(n)(ii) (*non-audit services*). The definitions of the four categories of services correspond to the *Commission's* descriptions of the services for which an *issuer* must disclose fees paid to its auditor. Compare the descriptions of services in Item 9(e) of *Commission* Schedule 14A (17 CFR § 240.14a–101) under the headings ''Audit Fees,'' ''Audit-Related Fees,'' ''Tax Fees,'' and ''All Other Fees'' with, respectively, the *Board's* definitions of *Audit Services, Other Accounting Services, Tax Services,* and *Non-Audit Services.*

Part IV—Audit Clients and Audit Reports

Item 4.1 Audit Reports Issued by the Firm

a. Provide the following information concerning each *issuer* for which the Firm issued any *audit report*(s) during the reporting period—

1. The *issuer's* name;

2. The *issuer's* CIK number, if any; and

3. The date(s) of the *audit report*(s).

b. If the Firm identified any *issuers* in response to Item 4.1.a., indicate, by checking the box corresponding to the appropriate range set out below, the total number of Firm personnel who exercised the authority to sign the Firm's name to an *audit report* during the reporting period. If the Firm checks the box indicating that the number is in the range of 1–9, provide the exact number.

1–9
10–25
26–50
51–100
101–200
More than 200

Note: In responding to Item 4.1, careful attention should be paid to the definition of *audit report,* which is found in Rule 1001(a)(vi) of the *Board's Rules,* and which does not encompass reports prepared for entities that are not *issuers,* as that term is defined in Rule 1001(i)(iii). Careful attention should also be paid to the definition of *issuer.* The Firm should not, for example, overlook the fact that investment companies may be issuers, or that employee benefit plans that file reports on *Commission* Form 11–K are *issuers.*

Note: In responding to Item 4.1, do not list any *issuer* more than once. For each *issuer,* provide in Item 4.1.a.3 the *audit report* dates (as described in AU 530, Dating of the Independent Auditor's Report) of all such *audit reports* for that *issuer,* including each date of any dual-dated *audit report.*

Note: Note: In responding to Item 4.1.a.3, it is not necessary to provide the date of any consent to an *issuer's* use of an *audit report* previously issued for that *issuer,* except that, if such consents constitute the only instances of the Firm issuing *audit reports* for a particular *issuer* during the reporting period, the Firm should include that *issuer* in Item 4.1 and include the dates of such consents in Item 4.1.a.3.

Item 4.2 Audit Reports With Respect to Which the Firm Played a Substantial Role During the Reporting Period

a. If no *issuers* are identified in response to Item 4.1.a, but the Firm *played a substantial role in the preparation or furnishing of an audit report* that was issued during the reporting period, provide the following information concerning each *issuer* with respect to which the Firm did so—

1. The *issuer's* name;

2. The *issuer's* CIK number, if any;

3. The name of the *registered public accounting firm* that issued the *audit report*(s);

4. The end date(s) of the fiscal period(s) covered by the financial statements that were the subject of the *audit report*(s); and

5. A description of the substantial role played by the Firm with respect to the *audit report*(s).

Note: If the Firm identifies any *issuer* in response to Item 4.1, the Firm need not respond to Item 4.2.

Note: In responding to Item 4.2, do not list any *issuer* more than once.

Part V—Offices and Affiliations

In Part V, the Firm should provide information that is current as of the last day of the reporting period.

Item 5.1 Firm's Offices

List the physical address and, if different, the mailing address, of each of the Firm's offices.

Item 5.2 Audit-related Memberships, Affiliations, or Similar Arrangements

a. State whether the Firm has any:

1. Membership or affiliation in or with any network, arrangement, alliance, partnership or association that licenses or authorizes *audit* procedures or manuals or related materials, or the use of a name in connection with the provision of *audit services* or accounting services;

2. Membership or affiliation in or with any network, arrangement, alliance, partnership or association that markets or sells *audit services* or through which joint *audits* are conducted; or

3. Arrangement, whether by contract or otherwise, with another entity through or from which the Firm employs or leases personnel to perform *audit services.*

b. If the Firm provides an affirmative response to Item 5.2.a, identify, by name and address, the entity with which the Firm has each such relationship, and provide a brief description of each such relationship.

Note: Item 5.2.b does not require information concerning every other entity that is part of the network, arrangement, alliance, partnership or association, but only information concerning the network, arrangement, alliance, partnership, or association itself, or the principal entity through which it operates.

Part VI—Personnel

In Part VI, the Firm should provide information that is current as of the last day of the reporting period.

Item 6.1 Number of Firm Personnel

Provide the following numerical totals—

a. Total number of the Firm's *accountants;*

b. Total number of the Firm's certified public accountants (include in this number all *accountants* employed by the Firm with comparable licenses from non-U.S. jurisdictions); and

c. Total number of the Firm's personnel.

Part VII—Certain Relationships

Item 7.1 Individuals With Certain Disciplinary or Other Histories

a. Other than a relationship required to be reported in Item 4.1 of Form 3, and only if the Firm has not previously identified the individual and the sanction or *Commission* order on Form 1, Form 2, or Form 3, state whether, as of the end of the reporting period, the Firm has any employee, partner, shareholder, principal, member, or owner who was the subject of a *Board* disciplinary sanction or a *Commission* order under Rule 102(e) of the *Commission's* Rules of Practice, entered within the five years preceding the end of the reporting period and without that sanction or order having been vacated on review or appeal, and who provided at least ten hours of *audit services* for any *issuer* during the reporting period.

b. If the Firm provides an affirmative response to Item 7.1.a, provide—

1. The name of each such individual;
2. A description of the nature of the relationship;
3. The date that the Firm entered into the relationship; and
4. The date of the relevant order and an indication whether it was a *Board* order or a *Commission* order.

Item 7.2 Entities With Certain Disciplinary or Other Histories

a. Other than a relationship required to be reported in Item 4.2 of Form 3, and only if the Firm has not previously reported the information on Form 1, Form 2, or Form 3, state whether, as of the end of the reporting period, the Firm was owned or partly owned by an entity that was the subject of (a) a *Board* disciplinary sanction entered within the five years preceding the end of the reporting period, which has not been vacated on review or appeal, suspending or revoking that entity's registration or disapproving that entity's application for registration, or (b) a *Commission* order under Rule 102(e) of the *Commission's* Rules of Practice entered within the five years preceding the end of the reporting period, which has not been vacated on appeal, suspending or denying the privilege of appearing or practicing before the *Commission.*

b. If the Firm provides an affirmative response to Item 7.2.a, provide—
1. The name of each such entity;
2. A description of the nature of the relationship;
3. The date that the Firm entered into the relationship; and
4. The date of the relevant order and an indication whether it was a *Board* order or a *Commission* order.

Item 7.3 Certain Arrangements To Receive Consulting or Other Professional Services

a. Other than a relationship required to be reported in Item 4.3 of Form 3, state whether the Firm received, or entered into a contractual or other arrangement to receive, from any individual or entity meeting the criteria described in Items 7.1.a or 7.2.a, consulting or other professional services related to the Firm's *audit* practice or related to services the Firm provides to *issuer audit* clients.

b. If the Firm provides an affirmative response to Item 7.3.a, provide—
1. The name of each such individual or entity;
2. A description of the nature of the relationship;
3. The date that the Firm entered into the relationship;
4. A description of the services provided or to be provided to the Firm by the individual or entity; and
5. The date of the relevant order and an indication whether it was a *Board* order or a *Commission* order.

Part VIII—Acquisition of Another Public Accounting Firm or Substantial Portions of Another Public Accounting Firm's Personnel

If the Firm became registered on or after [effective date of Rule 2201], the first annual report that the Firm files must provide this information for the period running from the date used by the Firm for purposes of General Instruction 9 of Form 1 (regardless of whether that date was before or after the beginning of the reporting period) through March 31 of the year in which the annual report is required to be filed.

Item 8.1 Acquisition of Another Public Accounting Firm or Substantial Portions of Another Public Accounting Firm's Personnel

a. State whether the Firm acquired another *public accounting firm.*

b. If the Firm provides an affirmative response to Item 8.1.a, provide the name(s) of the *public accounting firm*(s) that the Firm acquired.

c. State whether the Firm, without acquiring another *public accounting firm*, took on as employees, partners, shareholders, principals, members, or owners 75% or more of the persons who, as of the beginning of the reporting period, were the partners, shareholders, principals, members, or owners of another *public accounting firm.*

d. If the Firm provides an affirmative response to Item 8.1.c, provide the name of the other *public accounting firm* and the number of the other *public accounting firm's* former partners, shareholders, principals, members, owners, and *accountant*s that joined the Firm.

Part IX—Affirmation of Consent

Item 9.1 Affirmation of Understanding of, and Compliance With, Consent Requirements

Whether or not the Firm, in applying for registration with the *Board,* provided the signed statement required by Item 8.1 of Form 1, affirm that—

a. The Firm has consented to cooperate in and comply with any request for testimony or the production of documents made by the *Board* in furtherance of its authority and responsibilities under the Sarbanes-Oxley Act of 2002;

b. The Firm has secured from each of its *associated persons*, and agrees to enforce as a condition of each such person's continued employment by or other association with the Firm, a consent indicating that the *associated person* consents to cooperate in and comply with any request for testimony or the production of documents made by the *Board* in furtherance of its authority under the Sarbanes-Oxley Act of 2002, and that the *associated person* understands and agrees that such consent is a condition of his or her continued employment by or other association with the Firm; and

c. The Firm understands and agrees that cooperation and compliance, as described in Item 9.1.a, and the securing and enforcing of consents from its *associated persons* as described in Item 9.1.b, is a condition to the continuing effectiveness of the registration of the Firm with the *Board.*

Note 1: The affirmation in Item 9.1.b shall not be understood to include an affirmation that the Firm has secured such consents from any *associated person* that is a *registered public accounting firm.*

Note 2: The affirmation in Item 9.1.b shall not be understood to include an affirmation that the Firm has secured such consents from any *associated person* that is a *foreign public accounting firm* in circumstances where that *associated person* asserts that non-U.S. law prohibits it from providing the consent, so long as the Firm possesses in its files documents relating to the *associated person's* assertion about non-U.S. law that would be sufficient to satisfy the requirements of subparagraphs (2) through (4) of Rule 2207(c) if that *associated person* were a *registered public accounting firm* filing a Form 2 and withholding this affirmation. This exception to the affirmation in Item 9.1.b does not relieve the Firm of its obligation to enforce cooperation and compliance with *Board* demands by any such *associated person* as a condition of continued association with the Firm.

Note 3: If the Firm is a *foreign registered public accounting firm*, the affirmations in Item 9.1 that relate to *associated persons* shall be understood to encompass every *accountant* who is a proprietor, partner, principal, shareholder, officer, or *audit* manager of the Firm and who provided at least ten hours of *audit services* for any *issuer* during the reporting period.

Part X—Certification of the Firm

Item 10.1 Signature of Partner or Authorized Officer

This Form must be signed on behalf of the Firm by an authorized partner or officer of the Firm including, in accordance with Rule 2204, both a signature that appears in typed form within the electronic submission and a corresponding manual signature retained by the Firm. The signer must certify that—

a. the signer is authorized to sign this Form on behalf of the Firm;

b. the signer has reviewed this Form;

c. based on the signer's knowledge, the Firm has filed a special report on Form 3 with respect to each event that occurred before the end of the reporting period and for which a special report on Form 3 is required under the *Board*'s *rules*;

d. based on the signer's knowledge, this Form does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading; and

e. either—

1. based on the signer's knowledge, the Firm has not failed to include in this Form any information or affirmation that is required by the instructions to this Form, or

2. based on the signer's knowledge—

(A) the Firm is a *foreign registered public accounting firm and* has not failed to include in this Form any information or affirmation that is required by the instructions to this Form except for information or affirmations that the Firm asserts it cannot provide to the *Board* on this Form 2 without violating non-U.S. law;

(B) with respect to any such withheld information or affirmation, the Firm has satisfied the requirements of PCAOB Rule 2207(b) and has in its possession the materials required by PCAOB Rule 2207(c); and

(C) the Firm has indicated, in accordance with the instructions to this Form, each Item of this Form with respect to which the Firm has withheld any required information or affirmation.

The signature must be accompanied by the signer's title, the capacity in which the signer signed the Form, the date of signature, and the signer's business mailing address, business telephone number, business facsimile number, and business e-mail address.

Part XI—Exhibits

To the extent applicable under the foregoing instructions or the *Board's rules*, each annual report must be accompanied by the following exhibits:

Exhibit 3.2 Description of Methodology Used To Estimate Components of Calculation in Item 3.2 and Reasons for Using Estimates

Exhibit 99.1 Request for Confidential Treatment

Exhibit 99.3 Materials Required by Rule 2207(c)(2)–(4)—Submit Only as an Exhibit to an Amended Form 2 in Response to a Request Made Pursuant to Rule 2207(d)

Form 3—Special Report Form

General Instructions

1. Submission of this Report. Effective [effective date of Rule 2203], a *registered public accounting firm* must use this Form to file special reports with the *Board* pursuant to Section 102(d) of the *Act* and Rule 2203 and to file any amendments to a special report. Unless otherwise directed by the *Board,* the Firm must file this Form, and all exhibits to this Form, electronically with the *Board* through the *Board*'s Web-based system.

2. Defined Terms. The definitions in the *Board's rules* apply to this Form. Italicized terms in the instructions to this Form are defined in the *Board's rules.* In addition, as used in the instructions to this Form, the term ''the Firm'' means the *registered public accounting firm* that is filing this Form with the *Board.*

3. When this Report is Required and When It is Considered Filed. Upon the occurrence of any event specified in Part II of this Form, the Firm must report the event on this Form by following the instructions to this Form. With respect to events that occur on or after [effective date of Rule 2203] and while the Firm is registered, the Firm must file the Form no later than thirty days after the occurrence of the event reported. Certain additional requirements apply, but they vary depending on whether a firm was registered as of [effective date of Rule 2203]. A firm that becomes registered after [effective date of Rule 2203], must, within thirty days of receiving notice of *Board* approval of its registration application, file this Form to report any reportable events that occurred in a specified period before approval of the firm's application for registration. See Rule 2203(a)(2). A firm that was registered as of [effective date of Rule 2203], must, by [date 30 days after effective date of Rule 2203], file this Form to report certain additional information that is current as of [effective date of Rule 2203]. See Rule 2203(a)(3) and General Instruction No. 4 below. A special report shall be deemed to be filed on the date that the Firm submits a Form 3 in accordance with Rule 2203 that includes the signed certification required in Part VIII of Form 3.

4. Required Filing to Bring Current Certain Information for Firms Registered as of [effective date of Rule 2203]. If the Firm is registered as of [effective date of Rule 2203], the Firm must file a special report on this Form no later than [date 30 days after effective date of Rule 2203], to report the information specified below, to the extent that it has not been reported on the Firm's Form 1 filing. The Firm must make this Form 3 filing to report the following information even if the Firm has previously informally disclosed the information to the *Board* or its staff—

a. Information responsive to Items 2.4 through 2.9 and Item 4.1 if (1) the proceeding is pending as of [effective date of Rule 2203], and (2) the defendants or respondents as of that date include either the Firm or a person who is a partner, shareholder, principal, owner, member, or *audit* manager of the Firm as of that date;

b. Information responsive to Items 2.10 and 4.2 if (1) the conclusion of a proceeding as to any party specified there occurred after the date used by the firm for purposes of General Instruction 9 to Form 1 and before [effective date of Rule 2203], and (2) the proceeding resulted in any conviction of, judgment against, imposition of any liability or sanction on, or *Commission* Rule 102(e) order against the Firm or any person who is a partner, shareholder, principal, owner, member, or *audit* manager of the Firm as of [effective date of Rule 2203];

c. Information responsive to Items 2.11 and 4.3 if the Firm is the subject of a petition or proceeding described there as of [effective date of Rule 2203];

d. Information responsive to Items 2.12 through 2.14 and Part V if (1) the relationship commenced after the date used by the firm for purposes of General Instruction 9 to Form 1, (2) the specified disciplinary sanction or *Commission* Rule 102(e) order continued to be in effect as of [effective date of Rule 2203], and (3) the specified relationship continues to exist as of [effective date of Rule 2203];

e. Information responsive to Items 2.15 and 6.1 if (1) the loss of authorization relates to a jurisdiction or authority identified in Item 1.7 of the Firm's Form 1 and, (2) as of [effective date of Rule 2203], the Firm continues to lack the specified authorization in that jurisdiction;

f. Information responsive to Items 2.16 and 6.2 if the license or certification is in effect as of [effective date of Rule 2203]; and

g. Information responsive to Items 2.17 and 2.18 and Part VII that is current as of [effective date of Rule 2203] to the extent that it differs from the corresponding information provided on the Firm's Form 1.

5. Completing the Form. A firm filing this Form must always complete Parts I, II, and VIII of this Form. Parts III through VII should be completed to the extent applicable, as described more fully in the instructions to Part II of the Form.

6. Amendments to this Report. Amendments shall not be filed to update information in a filed Form 3 that was correct at the time the Form was filed, but only to correct information that was incorrect at the time the Form was filed or to provide information that was omitted from the Form and was required to be provided at the time the Form was filed. When filing a Form 3 to amend an earlier filed Form 3, the Firm must supply not only the corrected or supplemental information, but must include in the amended Form 3 all information, affirmations, and certifications that were required to be included in the original Form 3. The Firm may access the originally filed Form 3 through the *Board*'s Web-based system and make the appropriate amendments without needing to re-enter all other information.

Note: The *Board* will designate an amendment to a special report as a report on ''Form 3/A.''

7. *Rules* Governing this Report. In addition to these instructions, the *rules* contained in Part 2 of Section 2 of the *Board's rules* govern this Form. Please read these *rules* and the instructions carefully before completing this Form.

8. Requests for Confidential Treatment. The Firm may, by marking the Form in accordance with the instructions provided, request confidential treatment of any information submitted in Item 3.1.c, Part IV, Part V, Item 6.1.d, Item 7.1.d, or Exhibit 99.3 of this Form that has not otherwise been publicly disclosed and that either contains information reasonably identified by the Firm as proprietary information or that is protected from public disclosure by applicable laws related to confidentiality of proprietary, personal, or other information. See Rule 2300. If the Firm requests confidential treatment, it must identify the information in Item 3.1.c, Part IV, Part V, Item 6.1.d, Item 7.1.d, or Exhibit 99.3 that it desires to keep confidential, and include, as Exhibit 99.1 to this Form, an exhibit that complies with the requirements of Rule 2300(c)(2). The *Board* will determine whether to grant confidential treatment requests on a case-by-case basis. If the Firm fails to include Exhibit 99.1, or includes an Exhibit 99.1 that fails to comply with Rule 2300(c)(2), the request for confidential treatment may be denied solely on the basis of that failure.

9. Assertions of Conflicts with Non-U.S. Law. If the Firm is a *foreign registered public accounting firm,* the Firm may, unless otherwise directed by the *Board* pursuant to Rule 2207(e), decline to provide certain information required by this Form if the Firm could not provide such information without violating non-U.S. law and the Firm proceeds in accordance with Rule 2207. The Firm may withhold responsive information on that basis from any Part of the Form other than Parts I, II, and VIII, and Items 7.1.a, 7.1.b, 7.1.c, and 7.2. If the firm withholds responsive information, the Firm must indicate, in accordance with the instructions in the relevant Part of the Form, the particular Items with respect to which the Firm has withheld responsive information. The Firm may not use the Form to make any general assertion that a particular requirement may conflict with non-U.S. law, but only to indicate that, on the basis of an asserted conflict, the Firm has in fact withheld from this Form required information.

10. Language. Information submitted as part of this Form, including any exhibit to this Form, must be in the English language.

Part I—Identity of the Firm

Item 1.1 Name of Firm

a. State the legal name of the Firm.

Note: If the Firm is filing this Form 3 to report that the Firm's legal name has changed, the name entered in Item 1.1.a should be the Firm's legal name before the name change that is being reported. The Firm's new name should be included in the response to Item 1.1.c.

b. If different than its legal name, state the name or names under which the Firm issues *audit reports*.

c. If the Firm is filing this Form 3 to report that the Firm's legal name has changed, state the new legal name of the Firm.

Part II—Reason for Filing This Report

Indicate, by checking the relevant box(es) from among Items 2.1 through 2.18 below, the event(s) being reported on this Form. More than one event may be reported in the same Form 3 filing. For each event indicated below, proceed to the Parts and Items of this Form indicated parenthetically for the specific event being reported and provide the information therein described. Provide responses only to those Parts and Items of the Form specifically indicated for the event or events that the Firm identifies in this Part II as an event being reported on this Form. (For example, if the Form is being filed solely to report that the Firm has changed its name, check the box for Item 2.17 in this Part of the Form, and complete only Item 7.1 and Part VIII of the Form.) If the Firm is filing this Form to amend a previous filing, the Firm also should complete Item 2.19.

Note: In Items 2.4 through 2.11 and Item 2.15, the reportable event is described in terms of whether the Firm ''has become aware'' of certain facts. For these purposes, the Firm is deemed to have become aware of the relevant facts on the date that any partner, shareholder, principal, owner, or member of the Firm first becomes aware of the facts.

Audit Reports

Item 2.1 The Firm has withdrawn an *audit report* on financial statements, or withdrawn its consent to the use of its name in a report, document, or written communication containing an *issuer*'s financial statements, and the *issuer* has failed to comply with a *Commission* requirement to make a report concerning the matter pursuant to Item 4.02 of *Commission* Form 8–K. (Complete Item 3.1 and Part VIII.)

Item 2.2 The Firm has issued *audit reports* with respect to more than 100 *issuers* in a calendar year immediately following a calendar year in which the Firm did not issue *audit reports* with respect to more than 100 *issuers*. (Complete Part VIII.)

Item 2.3 The Firm has issued *audit reports* with respect to 100 or fewer *issuers* in a completed calendar year immediately following a calendar year in which the Firm issued *audit reports* with respect to more than 100 *issuers*. (Complete Part VIII.)

Certain Legal Proceedings

Item 2.4 The Firm has become aware that the Firm has become a defendant in a criminal proceeding prosecuted by a governmental criminal law enforcement authority. (Complete Item 4.1 and Part VIII.)

Item 2.5 The Firm has become aware that, in a matter arising out of his or her conduct in the course of providing *audit services* or *other accounting services* to an *issuer*, a partner, shareholder, principal,

owner, member, or *audit* manager of the Firm has become a defendant in a criminal proceeding prosecuted by a governmental criminal law enforcement authority. (Complete Item 4.1 and Part VIII.)

Item 2.6 The Firm has become aware that a partner, shareholder, principal, owner, member, or *audit* manager of the Firm who provided at least ten hours of *audit services* for any *issuer* during the Firm's current fiscal year or its most recently completed fiscal year has become a defendant in a criminal proceeding prosecuted by a governmental criminal law enforcement authority and is charged with fraud, embezzlement, forgery, extortion, bribery, obstruction of justice, perjury, or false statements; or charged with any crime arising out of alleged conduct relating to accounting, auditing, securities, banking, commodities, taxation, consumer protection, or insurance. (Complete Item 4.1 and Part VIII.)

Item 2.7 The Firm has become aware that, in a matter arising out of the Firm's conduct in the course of providing professional services for a client, the Firm has become a defendant or respondent in a civil or alternative dispute resolution proceeding initiated by a governmental entity or in an administrative or disciplinary proceeding other than a *Board* disciplinary proceeding. (Complete Item 4.1 and Part VIII.)

Item 2.8 The Firm has become aware that, in a matter arising out of his or her conduct in the course of providing *audit services* or *other accounting services* to an *issuer*, a partner, shareholder, principal, owner, member, or *audit* manager of the Firm has become a defendant or respondent in a civil or alternative dispute resolution proceeding initiated by a governmental entity or in an administrative or disciplinary proceeding other than a *Board* disciplinary proceeding. (Complete Item 4.1 and Part VIII.)

Item 2.9 The Firm has become aware that, in a matter arising out of his or her conduct in the course of providing professional services for a client, a partner, shareholder, principal, owner, member, or *audit* manager of the Firm who provided at least ten hours of *audit services* for any *issuer* during the Firm's current fiscal year or its most recently completed fiscal year has become a defendant or respondent in a civil or alternative dispute resolution proceeding initiated by a governmental entity or in an administrative or disciplinary proceeding other than a *Board* disciplinary proceeding. (Complete Item 4.1 and Part VIII.)

Item 2.10 The Firm has become aware that a proceeding meeting the criteria described in Items 2.4, 2.5, 2.6, 2.7, 2.8, or 2.9 above has been concluded as to the Firm or a partner, shareholder, principal, owner, member, or *audit* manager of the Firm (whether by dismissal, acceptance of pleas, through consents or settlement agreements, the entry of a final judgment, or otherwise). (Complete Item 4.2 and Part VIII.)

Item 2.11 The Firm has become aware that the Firm, or the parent or a subsidiary of the Firm, has become the subject of a petition filed in a bankruptcy court, or has otherwise become the subject of a proceeding in which a court or governmental agency (or, in a non-U.S. jurisdiction, a person or entity performing a comparable function) has assumed jurisdiction over substantially all of the assets or business of the Firm or its parent or a subsidiary. (Complete Item 4.3 and Part VIII.)

Certain Relationships

Item 2.12 The Firm has taken on as an employee, partner, shareholder, principal, or member, or has otherwise become owned or partly owned by, a person who is currently the subject of (a) a *Board* disciplinary sanction suspending or barring the person from being an *associated person of a registered public accounting firm* or (b) a *Commission* order under Rule 102(e) of the *Commission*'s Rules of Practice suspending or denying the privilege of appearing or practicing before the *Commission*. (Complete Item 5.1 and Part VIII.)

Item 2.13 The Firm has become owned or partly owned by an entity that is currently the subject of (a) a *Board* disciplinary sanction suspending or revoking that entity's registration or disapproving that entity's application for registration, or (b) a *Commission* order under Rule 102(e) of the *Commission*'s Rules of Practice suspending or denying the privilege of appearing or practicing before the *Commission*. (Complete Item 5.2 and Part VIII.)

Item 2.14 The Firm has entered into a contractual or other arrangement to receive consulting or other professional services from a person or entity meeting any of the criteria described in Items 2.12 or 2.13 above. (Complete Item 5.3 and Part VIII.)

Licenses and Certifications

Item 2.15 The Firm has become aware that its authorization to engage in the business of auditing or accounting in a particular jurisdiction has ceased to be effective or has become subject to conditions or contingencies other than conditions or contingencies imposed on all firms engaged in the business of auditing or accounting in the jurisdiction. (Complete Item 6.1 and Part VIII.)

Item 2.16 The Firm has obtained a license or certification authorizing the Firm to engage in the business of auditing or accounting and which has not been identified on any Form 1 or Form 3 previously filed by the Firm, or there has been a change in a license or certification number identified on a Form 1 or Form 3 previously filed by the Firm. (Complete Item 6.2 and Part VIII.)

Changes in the Firm or the Firm's *Board* Contact Person

Item 2.17 The Firm has changed its legal name while otherwise remaining the same legal entity that it was before the name change. (Complete Item 7.1 and Part VIII.)

Item 2.18 There has been a change in the business mailing address, business telephone number, business facsimile number, or business e-mail of the person most recently designated by the Firm (on Form 2, Form 3, or Form 4) as the Firm's primary contact with the *Board,* or the Firm is designating a new person to serve as the primary contact. (Complete Item 7.2 and Part VIII.)

Amendment

Item 2.19 Amendments

If this is an amendment to a report previously filed with the *Board*—

a. Indicate, by checking the box corresponding to this item, that this is an amendment.

b. Identify the specific Item numbers of this Form (other than this Item 2.19) as to which the Firm's response has changed from that provided in the most recent Form 3 or amended Form 3 filed by the Firm with respect to the events reported on this Form.

Part III—Withdrawn *Audit Reports*

Item 3.1 Withdrawn Audit Reports and Consents

If the Firm has withdrawn an *audit report* on financial statements, or withdrawn its consent to the use of its name in a report, document, or written communication containing an *issuer's* financial statements, and the *issuer* has failed to comply with a *Commission* requirement to make a report concerning the matter pursuant to Item 4.02 of *Commission* Form 8–K, provide—

a. The *issuer's* name and CIK number, if any;

b. The date(s) of the *audit report*(s) that the Firm has withdrawn, or to which the Firm's withdrawal of consent relates; and

c. A description of the reason(s) the Firm has withdrawn the *audit report*(s) or the consent.

Note: The 30-day period in which the Firm must report the event does not begin to run unless and until the *issuer* fails to report on Form 8–K within the time required by the *Commission's* rules. The Firm must then report the event on Form 3 within 30 days of the expiration of the required Form 8–K filing deadline, unless, within that 30-day period, the *issuer* reports on a late-filed Form 8–K.

Part IV—Certain Proceedings

Item 4.1 Criminal, Governmental, Administrative, or Disciplinary Proceedings

If the Firm has indicated in this Form 3 that any of the events described in Items 2.4, 2.5, 2.6, 2.7, 2.8 or 2.9 has occurred, provide the following information with respect to each such event—

a. The name, filing date, and case or docket number of the proceeding, and the nature of the proceeding, *i.e.,* whether it is a criminal proceeding, a civil or alternative dispute resolution proceeding, or an administrative or disciplinary proceeding.

b. The name of the court, tribunal, or body in or before which the proceeding was filed.

c. An indication whether the Firm itself is a defendant or respondent in the proceeding and, if so, the statutes, rules, or legal duties that the firm is alleged to have violated, and a brief description of the firm's alleged conduct in violation of those statutes, rules, or legal duties.

d. The names of every defendant or respondent who is a partner, shareholder, principal, owner, member, or *audit* manager of the Firm, or who was such either at the time the Firm received notice of the proceeding or at the time of the alleged conduct on which any claim or charge is based, and who provided at least ten hours of *audit services* for any *issuer* during the Firm's current fiscal year or its most recent fiscal year; and, as to each such defendant or respondent, the statutes, rules, or legal duties that he or she is alleged to have violated, and a brief description of his or her alleged conduct in violation of those statutes, rules, or legal duties.

e. The name of any client that was the recipient of the professional services to which any claim or charge in the proceeding relates.

Note: For the purpose of this Part, administrative or disciplinary proceedings include those of the *Commission;* any other federal, *state,* or non-U.S. agency, board, or administrative or licensing authority; and any professional association or body. Investigations that have not resulted in the commencement of a proceeding need not be included.

Item 4.2 Concluded Criminal, Governmental, Administrative, or Disciplinary Proceedings

If any proceeding meeting the criteria described in Items 2.4, 2.5, 2.6, 2.7, 2.8 or 2.9, including any proceeding reported in Item 4.1, has been concluded as to the Firm or a partner, shareholder, principal, owner, member, or *audit* manager of the Firm (whether by dismissal, acceptance of pleas, through consents or settlement agreements, the entry of a final judgment, or otherwise), provide—

a. The name, filing date, and case or docket number of the proceeding, and the nature of the proceeding, *i.e.,* whether it is a criminal proceeding, a civil or alternative dispute resolution proceeding, or an administrative or disciplinary proceeding;

b. The name of the court, tribunal, or body in or before which the proceeding was filed; and

c. A brief description of the terms of the conclusion of the proceeding as to the Firm or partner, shareholder, principal, owner, member, or *audit* manager.

Item 4.3 Bankruptcy or Receivership

If the Firm, or the parent or a subsidiary thereof, has become the subject of a petition filed in a bankruptcy court, or has otherwise become the subject of a proceeding in which a court or governmental agency (or, in a non-U.S. jurisdiction, a person or entity performing a comparable function) has assumed jurisdiction over substantially all of the assets or business of the Firm or its parent or a subsidiary, provide—

a. the name of the proceeding;

b. the name of the court or governmental body;

c. the date of the filing or of the assumption of jurisdiction; and

d. the identity of the receiver, fiscal agent or similar officer, if applicable, and the date of his or her appointment.

Part V—Certain Relationships

Item 5.1 New Relationship With Person Subject to Bar or Suspension

If the Firm has taken on as an employee, partner, shareholder, principal, or member, or has otherwise become owned or partly owned by, a person who is currently the subject of (a) a *Board* disciplinary sanction suspending or barring the person from being an *associated person of a registered public accounting firm* or (b) a *Commission* order under Rule 102(e) of the *Commission's* Rules of Practice suspending or denying the privilege of appearing or practicing before the *Commission,* provide—

a. the name of the person;

b. the nature of the person's relationship with the Firm; and

c. the date on which the person's relationship with the Firm began.

Item 5.2 New Ownership Interest by Firm Subject to Bar or Suspension

If the Firm has become owned or partly owned by an entity that is currently the subject of (a) a *Board* disciplinary sanction suspending or revoking that entity's registration or disapproving that entity's application for registration, or (b) a *Commission* order under Rule 102(e) of the *Commission's* Rules of Practice suspending or denying the privilege of appearing or practicing before the *Commission,* provide—

a. the name of the entity that has obtained an ownership interest in the Firm;

b. the nature and extent of the ownership interest; and

c. the date on which the ownership interest was obtained.

Item 5.3 Certain Arrangements To Receive Consulting or Other Professional Services

If the Firm has entered into a contractual or other arrangement to receive consulting or other professional services from a person or entity meeting any of the criteria described in Items 2.12 or 2.13 above, provide—

a. the name of the person or entity;

b. the date that the Firm entered into the contract or other arrangement; and

c. a description of the services to be provided to the Firm by the person or entity.

Part VI—Licenses and Certifications

Item 6.1 Loss of, or Limitations Imposed on, Authorization To Engage in the Business of Auditing or Accounting

If the Firm's authorization to engage in the business of auditing or accounting in a particular jurisdiction has ceased to be effective or has become subject to conditions or contingencies other than conditions or contingencies imposed on all firms engaged in the business of auditing or accounting in the jurisdiction, provide—

a. the name of the *state,* agency, board or other authority that had issued the license or certification related to such authorization;

b. the number of the license or certification;

c. the date that the authorization ceased to be effective or became subject to conditions or contingencies, and

d. a brief description of the reason(s) for such action, including a description of the conditions or contingencies, if any.

Item 6.2 New License or Certification

If the Firm has obtained any license or certification authorizing the Firm to engage in the business of auditing or accounting, and which has not been identified on any Form 1 or Form 3 previously filed by the Firm, or there has been a change in any license or certification number identified on a Form 1 or Form 3 previously filed by the Firm, provide —

a. the name of the issuing *state,* agency, board or other authority;

b. the number of the license or certification;

c. the date the license or certification took effect; and

d. if the license or certification replaces another license or certification issued by the same authority, the number of the replaced license or certification.

Note: If the Firm is filing a Form 4 to report a change in its form of organization, change in jurisdiction, or a business combination, the Firm should report on Form 4, rather than Form 3, any related license change that takes effect before the submission of the Form 4.

Part VII—Changes in the Firm or the Firm's *Board* Contact Person

Item 7.1 Change in Name of Firm

If the Firm is reporting a change in its legal name—

a. State the new legal name of the Firm;

b. State the legal name of the Firm immediately preceding the new legal name;

c. State the effective date of the name change;

d. Provide a brief description of the reason(s) for the change; and

e. Affirm, by checking the box corresponding to this Item, that, other than the name change, the Firm is the same legal entity that it was before the name change.

Note: If, other than the name change, the Firm is not the same legal entity that it was before the name change, whether because of a change in the Firm's legal form of organization or because of other transactions, the registration status of the predecessor firm does not automatically attach to the Firm, and the Firm cannot report the event as a name change. If the Firm cannot make the affirmation required by Item 7.1.e, the Firm cannot execute the certification in Part VIII as to Item 7.1, and this Form cannot be deemed filed under Rule 2206.

In that event, the Firm should consider whether, pursuant to the provisions of Rule 2108, the Firm can make the representations required in a Form 4 filing to enable the predecessor firm's registration to attach to the Firm. If the Firm cannot or does not file with the *Board* a Form 4 making all necessary representations, the predecessor firm's registration does not attach to the Firm. In those circumstances, the Firm may not lawfully prepare or issue an *audit report* without first filing an application for registration on Form 1 and having that application approved by the *Board.*

Note: If the Firm is filing a Form 4 to report a change in its form of organization, change in jurisdiction, or a business combination, the Firm should report any related name change on Form 4 and not on Form 3.

Item 7.2 Change in Contact Information

If there has been a change in the business mailing address, business telephone number, business facsimile number, or business e-mail address of the person most recently designated by the Firm (on Form 2, Form 3, or Form 4) as the Firm's primary contact with the *Board,* or if the Firm is designating a new person to serve as the primary contact, provide the name and current business mailing address, business telephone number, business facsimile number, and business e-mail of the partner or authorized officer of the Firm who will serve as the Firm's primary contact with the *Board.*

Part VIII—Certification of the Firm

Item 8.1 Signature of Partner or Authorized Officer

This Form must be signed on behalf of the Firm by an authorized partner or officer of the Firm including, in accordance with Rule 2204, both a signature that appears in typed form within the electronic submission and a corresponding manual signature retained by the Firm. The signer must certify that—

a. the signer is authorized to sign this Form on behalf of the Firm;

b. the signer has reviewed this Form;

c. based on the signer's knowledge, this Form does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading; and

d. either—

1. based on the signer's knowledge, the Firm has not failed to include in this Form any information or affirmation that is required by the instructions to this Form, with respect to the event or events being reported on this Form, or

2. based on the signer's knowledge—

(A) the Firm is a *foreign registered public accounting firm* and has not failed to include in this Form any information or affirmation that is required by the instructions to this Form, with respect to the event or events being reported on this Form, except for information or affirmations that the Firm asserts it cannot provide to the *Board* on this Form 3 without violating non-U.S. law;

(B) with respect to any such withheld information or affirmation, the Firm has made the efforts required by PCAOB Rule 2207(b) and has in its possession the materials required by PCAOB Rule 2207(c); and

(C) the Firm has indicated, in accordance with the instructions to this Form, each Item of this Form with respect to which the Firm has withheld any required information.

The signature must be accompanied by the signer's title, the capacity in which the signer signed the Form, the date of signature, and the signer's business mailing address, business telephone number, business facsimile number, and business e-mail address.

Part IX—Exhibits

To the extent applicable under the foregoing instructions, each special report must be accompanied by the following exhibits:

Exhibit 99.1 Request for Confidential Treatment

Exhibit 99.3 Materials Required by Rule 2207(c)(2)–(4)—*Submit Only as an Exhibit to an Amended Form 3 in Response to a Request Made Pursuant to Rule 2207(d)*

In addition to the above rules and form instructions, the Board has adopted related amendments to PCAOB

Rules 1001, 2107, 2300, 4000, and 4003. The amendments are shown below, with new language italicized, deleted language in brackets, and unchanged language indicated by a series of three asterisks.

Section 1. General Provisions

Rule 1001. Definitions of Terms Employed in Rules

When used in the Rules, unless the context otherwise requires:

* * *

(a)(vii) Audit Services

The term ''audit services'' means [—

(1) subject to paragraph (a)(vii)(2) of this Rule, professional services rendered for the audit of an issuer's annual financial statements, and (if applicable) for the reviews of an issuer's financial statements included in the issuer's quarterly reports.

(2) effective after December 15, 2003,] professional services rendered for the audit of an issuer's annual financial statements, and (if applicable) for the reviews of an issuer's financial statements included in the issuer's quarterly reports or services that are normally provided by the accountant in connection with statutory and regulatory filings or engagements for those fiscal years.

* * *

(n)(ii) Non-Audit Services

The term ''non-audit services'' means [—

(1) subject to paragraph (n)(ii)(2) of this Rule, services related to financial information systems design and implementation as defined in Rule 2–01(c)(4)(ii) of Regulation S–X, 17 C.F.R. 2–01(c)(4)(ii), and all other services, other than audit services or other accounting services.

(2) effective after December 15, 2003,] all [other] services other than audit services, other accounting services, and tax services.

* * *

(o)(i) Other Accounting Services

The term ''other accounting services'' means [—

(1) subject to paragraph (o)(i)(2) of this Rule, services that are normally provided by the public accounting firm that audits the issuer's financial statements in connection with statutory and regulatory filings or engagements and assurance and related services that are reasonably related to the performance of the audit or review of the issuer's financial statements, other than audit services.

(2) effective after December 15, 2003,] assurance and related services that are reasonably related to the performance of the audit or review of the issuer's financial statements, other than audit services.

* * *

Section 2. Registration And Reporting

Part 1—Registration of Public Accounting Firms

* * *

Rule 2107. Withdrawal from Registration

* * *

(c) Effect of Filing

[(1)] Beginning on the date of Board receipt of a completed Form 1–WD, [the firm that filed the Form 1–WD shall not engage in the preparation or issuance of, or play a substantial role in the preparation or furnishing of, an audit report, other than to issue a consent to the use of an audit report for a prior period, unless it first withdraws its Form 1–WD.

(2) Beginning on the fifth day following the Board's receipt of a completed Form 1–WD,] and continuing for as long as the Form 1–WD is pending—

[(i) the firm may satisfy the annual reporting requirement by submitting a report stating that a completed Form 1–WD has been filed and is pending;]

(1) the firm shall not engage in the preparation or issuance of, or play a substantial role in the preparation or furnishing of, an audit report, other than to issue a consent to the use of an audit report for a prior period;

(*2*[i]) *the firm's obligation to file annual reports on Form 2, and special reports on Form 3 shall be suspended;*

[(ii) any annual fee assessed shall be zero;]

(*3*[iii]) the Board shall have the discretion to forego any regular inspection that would otherwise commence pursuant to Rule 4003(a) or Rule 4003(b); and

(*4*[iv]) the firm's registration status shall be designated as ''registered—withdrawal request pending,'' and the firm shall not publicly represent its registration status without specifying it as ''registered—withdrawal request pending.''

* * *

(f) Withdrawal of Form 1–WD

A registered public accounting firm that has submitted a Form 1–WD may withdraw the form at any time by filing with the Board a written notice of intent to withdraw the Form 1–WD along with any annual fee [and], annual report*, and special report* that the firm would have been required to submit during the period that the Form 1–WD was pending if not for the provisions of paragraph (c)(2).

Part 3—Public Availability of Applications and Reports

Rule 2300. Public Availability of Information Submitted to the Board; Confidential Treatment Requests.

(a) Except as provided in paragraph (b) below—

(1) an application for registration will be publicly available as soon as practicable after the Board approves or disapproves such application; *and*

(2) all other forms filed pursuant to Part 1 or Part 2 of this Section of the Rules of the Board, and any amendments thereto, will be publicly available as soon as practicable after filing, except to the extent otherwise specified in the Board's rules or the instructions to the form.

(b) Confidential Treatment Requests.

(1) A public accounting firm may request confidential treatment of any information submitted to the Board in connection with its application for registration *on Form 1, and may request confidential treatment of information on other forms filed pursuant to Part 1 or Part 2 of this Section of the Rules of the Board to the extent specified in the instructions to the form,* provided that the information as to which confidential treatment is requested—

([1]*i*) has not otherwise been publicly disclosed, and

([2]*ii*) either (*A*[i]) contains information reasonably identified by the public accounting firm as proprietary information, or (*B*[ii]) is protected from public disclosure by applicable laws related to the confidentiality of proprietary, personal, or other information.

(2) *Failure to provide an exhibit that complies with the requirements of paragraph (c)(2) of this Rule constitutes sufficient grounds for denial of any request for confidential treatment.*

(c) Application Procedures.

To request confidential treatment of information *for which such requests are permitted by paragraph (b)(1) of this Rule[* submitted to the Board in connection with an application for registration], the [applicant] *requestor* must—

(1) identify, in accordance with the instructions [on Form 1] *to the form,* the information that it desires to keep confidential; and

(2) include as an exhibit to [Form 1 a detailed explanation as to why, based on the facts and circumstances of the particular case, the information meets the requirements of paragraph (b) of this Rule.] *the form a representation that, to the requestor's knowledge, the information for which confidential treatment is requested has not otherwise been publicly disclosed and—*

(i) a detailed explanation of the grounds on which the information is considered proprietary; or

(ii) a detailed explanation of the basis for asserting that the information is protected by law from public disclosure and a copy of the specific provision of law that the requestor claims protects the information from public disclosure.

* * * * *

(f) Unless the [applicant] *requestor* requests otherwise, the exhibit containing an explanation supporting a confidential treatment request will be afforded confidential treatment without the need for a request for confidential treatment.

(g) Information as to which the Board grants confidential treatment under this [r]*R*ule will not be made available to the public by the Board. The granting of confidential treatment will not, however, limit the ability of the Board (1) to provide the information as to which confidential treatment was granted to the Commission, or (2) to comply with any subpoena validly issued by a court or other body of competent jurisdiction. In the event the Board receives such a subpoena, the Board will notify the [applicant] *public accounting firm* of such subpoena, to the extent permitted by law, to allow the [applicant] *public accounting firm* the opportunity to object to such subpoena.

* * * * *

Section 4. Inspections

Rule 4000. General

(a) Every registered public accounting firm shall be subject to all such regular and special inspections as the Board may from time to time conduct in order to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with the Act, the Board's rules, the rules of the Commission, and professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers.

(b) In furtherance of the Board's inspection process, the Board may at any time request that a registered public accounting firm provide to the Board additional information or documents relating to information provided by the firm in any report filed pursuant to Section 2 of these Rules, or relating to information that has otherwise come to the Board's attention. Any request for information or documents made pursuant to this Rule, and any information or documents provided in response to such a request, shall be considered to be in connection with the next regular or special inspection of the registered public accounting firm.

(c) Inspection steps and procedures shall be performed by the staff of the Division of Registration and Inspections, and by such other persons as the Board may authorize to participate in particular inspections or categories of inspections.

* * * * *

Rule 4003. Frequency of Inspections

* * * * *

(c) With respect to a registered public accounting firm that has filed a completed Form 1–WD under Rule 2107, the Board shall have the discretion to forgo any regular inspection that would otherwise commence during the period beginning on the [fifth day following the filing of the] *date of Board receipt of a* completed Form 1–WD and continuing until the firm's registration is deemed withdrawn or the firm withdraws the Form 1–WD.

* * * * *

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rule. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

(a) Purpose

Section 102(d) of the Act provides that each registered public accounting firm shall provide an annual report to the Board, and may be required to report more frequently, as necessary to update information in its application for registration and to provide such additional information as the Board or the Commission may specify. The purpose of the proposed new rules and forms is to establish the foundation of a reporting and disclosure system for registered public accounting firms pursuant to Section 102(d) of the Act, and to specify the details of certain reporting obligations and provide forms for such reporting. To the extent that the Board identifies additional reporting requirements that are necessary or appropriate in the public interest or for the protection of investors, the Board may propose and adopt them in the future.

The proposed reporting requirements serve three fundamental purposes. First, firms will report information to keep the Board's records current about such basic matters as the firm's name, location, contact information, and licenses. Second, firms will report information reflecting the extent and nature of the firm's audit practice related to issuers in order to facilitate analysis and planning related to the Board's inspection responsibilities and to inform other Board functions, as well as for the value the information may have to the public. Third, firms will report circumstances or events that could merit follow-up through the Board's inspection process or its enforcement process, and that also may otherwise warrant being brought to the public's attention (such as a firm's withdrawal of an audit report in circumstances where the information is not otherwise publicly available).

The reporting framework includes two types of reporting obligations. First, it requires each registered firm to provide basic information once a year about the firm and the firm's issuer-related practice over the most recent 12-month period. The firm must do so by filing an annual report on Form 2. Second, upon the occurrence of specified events, a firm must report certain information by filing a special report on Form 3.

Proposed Rule 2201 sets June 30 as the deadline for the annual filing of Form 2. The reporting period covered by the report would be April 1 to March 31, leaving each firm with three months to prepare and file a Form 2 reflecting information from that 12-month period. Any firm that was registered as of March 31 of a particular year would be required to file Form 2 by June 30 of that year, but any firm that became registered in the period between and including April 1 and June 30 would not be required to file a Form 2 until June 30 of the following year.

Under the proposed rules, the occurrence of specified events triggers an obligation to file a special report on Form 3. The proposed rules provide that special reports must be filed within 30 days of the triggering event.

The Board expects annual and special reports to be complete and accurate, and inaccuracies or omissions could form the basis for disciplinary sanctions for failing to comply with the reporting requirements reflected in Rules 2200 and 2203 and the instructions to Forms 2 and 3. Proposed Rule 2205 provides for the filing of amendments to previously filed annual or special reports if the originally filed report

included information that was incorrect at the time of the filing, or if the originally filed form omitted any information or affirmation that was, at the time of such filing, required to be included in that report.

Annual and special reports will be made public on the Board's Web site promptly upon being filed by a firm, subject to exceptions for information for which a firm requests confidential treatment. The Board intends that as much reported information as possible be publicly available as soon as possible after filing. The proposed forms identify certain categories of information for which a firm may request confidential treatment. The proposed rules include new requirements concerning the support that a firm must supply for a confidential treatment request.[1] The proposed amendments require that a firm support a request with both a representation that the information has not otherwise been publicly disclosed and either (1) a detailed explanation of the grounds on which the information is considered proprietary, or (2) a detailed explanation of the basis for asserting that the information is protected by law from public disclosure and a copy of the specific provision of law. The proposed amendments also provide that the firm's failure to supply the required support constitutes sufficient grounds for denial of the request.

Under proposed Rule 2207, a non-U.S. firm may withhold required information from Form 2 or Form 3 if the firm cannot provide the information without violating non-U.S. law. If the firm withholds information on that ground, it must have certain supporting materials, including (1) a copy of the relevant provisions of non-U.S. law, (2) a legal opinion concluding that the firm would violate non-U.S. law by submitting the information to the Board, and (3) a written explanation of the firm's efforts to seek consents or waivers that would be sufficient to overcome the conflict with respect to the information. The firm must certify on the form that it has the supporting materials in its possession. The rule reserves to the Board, and to the Director of the Division of Registration and Inspections, the discretion to require that a firm submit any of those supporting materials in a particular case. The rule also reserves to the Board the discretion to require that the firm provide any of the withheld information in a particular case.

The proposed rules include an amendment to the Board's inspection rules that makes clear that the Board may require a firm to provide additional information. Specifically, existing Rule 4000 provides that registered firms shall be subject to such regular and special inspections as the Board chooses to conduct. The proposed amendment adds a paragraph providing that the Board, in the exercise of its inspection authority, may at any time request that a registered firm provide additional information or documents relating to information provided on Form 2 or Form 3, or relating to information that has otherwise come to the Board's attention. The amendment provides that the request and response are considered to be in connection with the firm's next regular or special inspection. Accordingly, the cooperation requirements of Rule 4006 apply, and the request and response are subject to the confidentiality restrictions of Section 105(b)(5) of the Act.

Existing Rule 2107 governs the process by which a firm may seek to withdraw from registration with the Board. Under Rule 2107, a firm cannot withdraw at will, but must request the Board's permission to withdraw, and the Board may withhold that permission under certain conditions. The proposed rules include an amendment to Rule 2107 to change the way it addresses the reporting obligations of a firm that has filed Form 1–WD seeking leave to withdraw. Existing Rule 2107(c)(2)(i) provides that, beginning on the fifth day after the Board receives a completed Form 1–WD, the firm can satisfy any annual reporting requirement by submitting a report stating that a completed Form 1–WD has been filed and is pending. Under the proposed amendment, the firm's reporting obligation, including both annual and special reporting, would simply be suspended while Form 1–WD was pending. If a firm withdraws its Form 1–WD and continues as a registered firm, however, Rule 2107 would require the filing of any annual or special reports, and the payment of any annual fee, that otherwise would have been required while the Form 1–WD was pending. The Board is also eliminating from Rule 2107 the five-day delay between receipt of a completed Form 1–WD and the effect of that filing on a firm's reporting obligation. Suspension of that obligation would occur immediately upon the Board's receipt of the completed Form 1–WD.[2]

The Board also proposed to delete from definitions in PCAOB Rule 1001 certain provisions that ceased to apply after December 15, 2003. Specifically, the Board proposes to amend Rules 1001(a)(vii) (definition of ''audit services''), 1001(o)(i) (definition of ''other accounting services''), and 1001(n)(ii) (definition of ''tax services'') by deleting the paragraph denominated ''(1)'' from each rule.

The proposed rules would take effect 60 days after Securities and Exchange Commission approval.

(b) Statutory Basis

The statutory basis for the proposed rule is Title I of the Act.

B. Board's Statement on Burden on Competition

The Board does not believe that the proposed rules will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rules impose no burden beyond burdens clearly imposed and contemplated by the Act.

C. Board's Statement on Comments on the Proposed Rules Received From Members, Participants or Others

The Board released the proposed rules and form instructions for public comment in Release No. 2006–004 (May 23, 2006). A copy of Release No. 2006–004 and the comment letters received in response to the PCAOB's request for comment are available on the PCAOB's Web site at *http://www.pcaobus.org.* The Board received twelve written comment letters. The Board has clarified and modified certain aspects of the proposed rules and form instructions in response to the comments it received, as discussed below.

Commenters voiced concern about burdens associated with the proposed requirement to report the percentage of total fees billed to all clients that is attributable to fees billed in each of four categories of services provided to issuer audit clients. Commenters indicated that firms, particularly large firms, may not be able to comply with the proposed requirement without making costly changes to their internal systems. The Board has weighed these concerns carefully, bearing in mind that the purposes for which the information is

[1] The proposed amendments to Rule 2300(b)–(c), concerning the required support, would also apply prospectively to confidential treatment requests on applications for registration on Form 1.

[2] In connection with that change to Rule 2107, the amendment also eliminates the five-day delay before certain other consequences take effect. Among other things, the Board is amending Rule 2107(c)(2)(iii) so that the Board would, immediately upon receipt of the completed Form 1–WD, have the discretion to forego any regular inspection of the firm that otherwise would commence. This change necessitates a conforming change to Rule 4003(c), and the Board is making that conforming change as well.

sought do not depend upon a high level of precision in the data. The Board is adopting a modified version of the proposed requirement, incorporating some elements of alternatives suggested by commenters.

Form 2 will allow a firm to select from two methods of calculating the percentages to report. Firms that are reasonably able to report the requested percentages based on data precisely coinciding with the annual reporting period (*i.e.,* the data specified by the proposed requirement) may do so. As an alternative, a firm may, for each category of services, report the percentage derived by (1) using as a denominator the total fees billed to all clients in the firm's fiscal year that ended during the annual reporting period and (2) using as a numerator the total issuer audit client fees as determined by reference to the fee amounts disclosed to the Commission by those clients for each client's fiscal year that ended during the reporting period (or, for clients who have not made the required Commission filings, the fee amounts required to be disclosed). Under either approach, a firm may use any reasonable method to estimate the components and may round the reported percentages to the nearest five percent. Firms that use estimated data in their calculations should briefly describe their methodology in an exhibit to Form 2.

Some commenters also expressed concern about what they saw as a disconnect between the four categories of services used in the proposed form and the four categories of fees that the Commission requires issuers to report in proxy filings. The Board reiterates that its definitions of these four categories of services correspond to the Commission's descriptions of services for which an issuer must disclose the fees paid to its auditor.[3] The Board is not adopting commenters' suggestions to make the Board's labels conform to the Commission's labels (*i.e.,* to say ''audit-related services'' instead of ''other accounting services'' and to say ''all other services'' instead of ''non-audit services'') because the labels that the Board uses come from Section 102(b)(2)(B) of the Act and have been used in all applications for registration on Form 1. Commenters also noticed a disconnect between Item 3.2's focus on fees billed and the reference to ''revenues'' in Item 3.2's caption. The Board has changed the caption to refer to fees billed instead of revenues.

Item 4.1 of Form 2 requires information relating to a firm's issuance of audit reports during the reporting period. As it was proposed, Item 4.1 would have required, among other things, the total number of firm personnel who exercised authority to sign the firm's name to an audit report during the reporting period. Commenters suggested various alternatives to requiring that precise number. Bearing in mind that, here too, the purposes for which the information is sought—principally inspection scoping and planning—do not depend upon precise information, the Board has adopted a slightly modified version of an approach suggested by a commenter. As adopted, Item 4.1.b requires a firm to indicate from among the following ranges how many individuals exercised the authority to sign the firm's name to an audit report in the reporting period: 1–9, 10–25, 26–50, 51–100, 101–200, or more than 200. If the firm indicates that the range is 1–9, the firm must also provide the exact number.

One commenter sought clarification on whether the audit report date being requested referred to the date of the auditor's report, the report release date pursuant to PCAOB Auditing Standard No. 3, *Audit Documentation,* or the date that the issuer filed the report with the Commission. A note to Item 4.1 now clarifies that the date called for by Item 4.1.a.3 is the date of the audit report, as described in AU 530, *Dating of the Independent Auditor's Report.* A note has also been added to clarify that it is not necessary to provide the date of any consent to an issuer's use of an audit report previously issued for that issuer, except that, if such consents constitute the only instances of the firm issuing audit reports for a particular issuer during the reporting period, the firm should include that issuer in Item 4.1 and include the dates of such consents in Item 4.1.a.3.

If, during the reporting period, a firm plays a substantial role in the preparation or furnishing of an audit report that was issued in the reporting period, but the firm did not issue audit reports required to be reported under Item 4.1, the firm must report certain information under Item 4.2. As proposed, Item 4.2.a.4 would have required the firm to report the date of each such audit report. One commenter expressed concern that a firm might not have access to the date of an audit report issued by another firm. The Board has revised Item 4.2.a.4 to require, instead, the end date of the fiscal period covered by the financial statements that were the subject of the audit report.

Item 5.2.a.3, as proposed, would have required the firm to state whether it has any ''affiliation, whether by contract or otherwise, with another entity through or from which the firm commonly employs or leases personnel to perform audit services, or with which the firm otherwise engages in an alternative practice structure.'' Commenters asked for clarification of ''commonly'' and also suggested that the term ''affiliation'' could cause confusion since the item does not appear intended to be limited to relationships commonly viewed as ''affiliate'' relationships. The final version of Item 5.2.a.3 avoids the use of ''affiliation'' and ''commonly'' and requires the firm to state whether it has any ''arrangement, whether by contract or otherwise, with another entity through or from which the firm employs or leases personnel to perform audit services.'' One commenter also asked the Board to clarify that Item 5.2.a.3 does not encompass a firm's hiring of, or contracting for, support personnel. Item 5.2.a.3, by its terms, encompasses only arrangements through which the firm employs or leases ''personnel to perform audit services.''

Regarding Part VI, commenters expressed concern about Item 6.1.d's requirement to provide information about the number of firm personnel, segregated by functional level, who provided audit services during the reporting period. Commenters stated that some firms cannot readily track with precision the number of such individuals. Commenters constructively suggested various alternative ways to collect a rough surrogate for that number. The Board has concluded, however, not to adopt any version of Item 6.1.d at this time.

Item 6.1.b requires the firm to report the total number, as of the end of the reporting period, of the firm's certified public accountants, and requires the firm to include in that number any firm accountants with ''comparable licenses'' from non-U.S. jurisdictions. One commenter asked for clarification of the ''comparable license'' concept. The ''comparable license'' concept is not new, but is employed in the Form 1 application for registration. Even so, the commenter suggested clarifying that the requirement refers to accountants that are (1) licensed by the jurisdiction in which they render services and (2) by virtue of such license, are certified to perform the functions of a public accountant. The Board confirms this as

[3] Compare the descriptions of services in Item 9(e) of Commission Schedule 14A (17 CFR 240.14a–101) under the headings ''Audit Fees,'' ''Audit-Related Fees,'' ''Tax Fees,'' and ''All Other Fees'' with, respectively, the Board's definitions of ''Audit Services'' (Rule 1001(a)(vii)), ''Other Accounting Services'' (Rule 1001(o)(i)), ''Tax Services'' (Rule 1001(t)(i)), and ''Non-Audit Services'' (Rule 1001(n)(ii)). The note to Item 3.2 on Form 2 has been expanded to highlight this point.

the appropriate understanding of the requirement.

In Part VII of Form 2, the firm must report information if it stands in certain relationships to individuals who, or entities that, were the subject of a Board order imposing a disciplinary sanction or a Commission Rule 102(e) order entered within the five years preceding the end of the reporting period.

As proposed, the Part VII items would have required a firm to report new relationships commenced during the reporting period, and the proposal would have required every firm's first Form 2 filing to report this information not only for the reporting period but for the entire period back to the cut-off date that the firm used for information it supplied in its Form 1 application. For hundreds of firms' first Form 2 filings, that period would be more than five years.

In response to comments about that burden, the Board has restructured the Part VII items relating to firm personnel or owners to capture only relationships that (1) exist as of the end of the reporting period, (2) are with individuals or entities whose relevant disciplinary sanction or Rule 102(e) order was entered within the five years preceding the end of the reporting period, and (3) have not previously been reported by the firm on Forms 1, 2, or 3. The Board has also restructured the Part VII item relating to receipt of consulting or professional services to capture only relationships that involve services received, or contracted for, in the reporting period. With these changes, a firm's first Form 2 will still effectively serve to fill any gap, but the burden will only extend to currently relevant information. Subsequent Form 2 filings need not report the same information again just because the relationship continues to exist at the end of the reporting period.

In response to commenters' concerns and suggestions, the Board has also limited the scope of relevant firm personnel to those who provided at least ten hours of audit services for any issuer during the reporting period. It is important to note, however, how this change intersects with the structural change described above. Just because an individual does not meet the ten-hour threshold during the reporting period in which the relationship begins does not mean that the firm need never report the relationship. If there is a later reporting period in which that person meets the ten-hour threshold, and that reporting period end is still within five years of the entry of the disciplinary sanction or Commission order, the firm must report that relationship in its annual report for that period. The relationship need only be reported one time, however, and need not be reported again for future reporting periods in which the criteria are met.

Also in response to comments, the Board has added a scope limitation to Part VII's approach concerning the firm's receipt of consulting or other professional services. The Board has narrowed the reporting trigger to encompass only arrangements for services related to the firm's audit practice or related to services the firm provides to issuer audit clients. The reporting obligation is triggered for any reporting period that ends less than five years after entry of the disciplinary sanction or Commission order and in which the firm has received or arranged to receive such services.

Finally, the Board is eliminating one category of reportable relationships that was included in the proposal. The Board proposed that firms report information if they entered into a relationship with any individual who, while not having been sanctioned personally, was a principal of a firm at the time of conduct for which the firm was later subjected to specified sanctions. After carefully considering comments, however, the Board is persuaded that any occasional value this information might have is outweighed by the fact that treating this information as a risk indicator about either the firm or the individual has the potential to diminish the professional opportunities of (1) individuals who had no connection to the misconduct at all, and (2) individuals who had a connection to alleged misconduct, but who never had an opportunity to defend against charges because a regulator was satisfied to conclude the matter through a settlement with the firm. In addition, the Board is sensitive to the unusual burden that would be placed on firms not only to ascertain this information at the time they commence the relationship, but also to continually monitor for it, since the relevant sanction might not be entered until years after the conduct.

In Part VIII of Form 2, the firm must report information if it has acquired another public accounting firm or taken on 75 percent or more of another accounting firm's principals. Commenters suggested the need for some clarification, and the Board has made changes to clarify two points. First, where the proposal referred only to acquisition of an ''accounting firm''—which commenters correctly noted is not a term defined in the Act or the Board's rules—the final form now refers to a ''public accounting firm,'' which is defined in both the Act and the rules. Second, with respect to taking on 75 percent or more of another firm's principals, the final form includes language clarifying that the reference is to 75 percent of the persons who were principals of the other firm ''as of the beginning of the reporting period.''

Form 2 requires an annual affirmation related to the Act's requirements that the firm consent to cooperate with the Board and enforce cooperation by the firm's associated persons. Tracking the consent language included in Form 1, Form 2 requires the firm (1) to affirm its consent to cooperate with Board requests for testimony or documents, (2) to affirm that it has secured from each of its associated persons the required consents to cooperate with the Board, and (3) to affirm the firm's understanding and agreement that its cooperation and compliance, and the securing and enforcing of consents from its associated persons, is a condition of its continued registration with the Board.

One commenter seemed to misunderstand the proposal and suggested that the Board make clear that this requirement is an update of the Form 1 consent and is required only for new employees since a firm's initial registration. The Form 2 affirmation does not impose a new substantive requirement but merely requires the firm to affirm that it remains aware of its continuing obligation to cooperate and that it has in fact been keeping up with its ongoing obligation to secure the requisite consents from all of its associated persons.

The reporting framework includes accommodations for firms faced with potential non-U.S. legal obstacles to their ability to comply with Form 2 requirements. One such accommodation is reflected in a note to the Form 2 affirmation section. The note explains that the affirmation shall not be understood to include an affirmation that the firm has secured consents from associated persons that are unregistered foreign firms that assert that non-U.S. law prohibits them from providing the consent, as long as certain requirements concerning that assertion are satisfied. Two commenters expressed concern about the note's provision that the registered firm (filing the Form 2) must have in its possession documents relating to the unregistered firm's asserted conflict that would be sufficient to satisfy the requirements of Rule 2207(c)(2)–(4). The commenters expressed concern about whether that language effectively requires the registered firm (filing the Form 2) to assess the substance of the unregistered

non-U.S. firm's conflict assertion. The note requires no such assessment by the registered firm, but only requires the firm to ascertain that the documents appear, on their face, to be the documents described in Rule 2207(c)(2)–(4).

Rule 2201 sets June 30 as the deadline for the annual filing of Form 2. The reporting period covered by the report would be April 1 to March 31. Commenters suggested alternatives, such as tying a firm's reporting deadline to that firm's fiscal year, to avoid what those commenters saw as unnecessary burdens on firms. In the Board's view, a single filing deadline for all firms is more appropriate than varying deadlines tied to individual firms' fiscal years. The Board has considered the comments about burden and has made changes that will address those concerns—such as allowing a firm to use its and its clients' fiscal year data in reporting the fee billing information—without introducing varying reporting periods and deadlines for different firms. With those changes, the required Form 2 reporting does not involve any complexity or burden that makes it unreasonable to require all firms to supply the information according to the same schedule.

Under the rules, the occurrence of specified events triggers an obligation to file a special report on Form 3. The list of reporting triggers reflects the Board's decision, after consideration of comments, to drop some items from the list that was proposed and to refine the focus of other items. The changes and clarifications relate to a client's unauthorized use of the firm's name, reportable criminal and other proceedings, reportable new relationships, and changes in authorization to engage in the business of auditing.

The Board has excluded from the final requirements one special reporting trigger that was proposed: An issuer's unauthorized use of the firm's name, such as by making a filing with the Commission that includes an audit report that the issuer falsely represents as having been issued by the firm. In proposing that item, the Board noted that it might protect investors and serve the public interest by drawing attention to a potential problem relatively quickly. The commenters who addressed the point expressed a view that this reporting requirement would be fundamentally about issuer conduct and, therefore, is more appropriately left to the Commission in the context of its disclosure framework and its framework for addressing Section 10A(b) reports from auditors. After consideration of those comments, the Board has decided not to adopt such a requirement at this time.

The proposed rules included a requirement that a firm file a special report when it withdraws an audit report, but also provided an exception to that requirement if the issuer audit client had already disclosed the relevant information in a Form 8–K filing with the Commission. The views expressed by commenters on this point were similar to the views described above with respect to an issuer's unauthorized use of a firm's name.

The Board is adopting this item as proposed. The point of this item is not to have the firm draw the Board's attention to potential problems with an issuer's financial statements. A withdrawn audit report is a risk indicator concerning the auditor's conduct preceding the withdrawal, not merely a risk indicator concerning the issuer's financial statements. The Board has a regulatory interest in being aware of that information and possibly following up on that information for reasons directly related to its oversight of auditors.

Nor is the point of the item to have the firm draw the Board's attention to a failure by the issuer to file a required Form 8–K. The Board's interest is in the fact of the withdrawn audit report. In the usual case, the Board can obtain that information from issuer Form 8–K filings without requiring duplicative filing by the firm, but the Board cannot do so if the issuer does not file the Form 8–K. For that reason, the Form 3 requirement is limited to circumstances in which the information is not otherwise available to the Board through a Form 8–K filing.

One commenter noted that if an issuer is no longer a client, the firm may not be in a position to monitor whether that former client has made the Form 8–K filing. Item 4.02(c) of Form 8–K, however, requires the issuer to provide the firm with a copy of the disclosures it is making in response to Item 4.02 no later than the day the issuer files the Form 8–K, and also requires the issuer to request that the firm furnish to the issuer a letter addressed to the Commission stating whether the firm agrees with the statements made by the issuer in response to Item 4.02. The firm should, therefore, generally be in a position to know whether the issuer has made the filing.

As proposed, Form 3 would have required a firm to file a special report if a partner, shareholder, principal, owner, member, or audit manager of the firm became a defendant in criminal proceedings involving certain categories of offenses. After consideration of comments, the Board has narrowed this requirement in two respects. First, the Board has reformulated these Form 3 reporting triggers to distinguish between proceedings that arise out of conduct in providing audit services or other accounting services for issuers and proceedings that do not arise out of such conduct. As to the latter category, the reporting obligation will be triggered only if the relevant individual provided at least ten hours of audit services for any issuer during the firm's current or most recently completed fiscal year. Second, the Board has eliminated from the categories of relevant offenses two relatively broadly described categories: Crimes arising out of alleged conduct relating to ''dishonesty,'' and crimes arising out of alleged conduct that, if proven, ''would bear materially on the individual's fitness to provide audit services to issuers.''

One commenter expressed uncertainty about whether a firm would need to report the event if the firm suspended or terminated the individual or prohibited the individual from providing audit services for issuers. The reporting obligation includes no such qualification. The firm's reporting obligation is triggered when it becomes aware of the proceeding, and that obligation is not cut off if the firm terminates its relationship with the individual.

Some commenters sought clarification about the inclusion of ''managers'' and ''members'' within the scope of relevant individuals. One commenter asked whether ''members'' was meant to include employees generally. ''Members'' is not meant to include all employees but, rather, is intended as it is often used in firms' structures and parlance to distinguish those with certain ownership or governance rights from others. Some commenters noted that ''managers'' typically are not owners or partners and so questioned whether the Board intended to include them within the scope of this requirement. The Board is aware of the distinction and does intend the requirement to encompass manager-level personnel. The Board has, however, referred in the final rules to ''audit manager'' rather than merely ''manager,'' to avoid any possible confusion about other sorts of managers, as the term is more generally used.

Some commenters expressed concern about the information that Form 3 would require the firm to provide about the proceedings that triggered the reporting requirement. Commenters suggested that providing descriptions of the proceedings could be burdensome,

that the descriptions would be inherently subjective, and that the descriptions should not be in the public arena while the proceeding is ongoing. The Board has not made any changes related to this point. Form 3 requires the firm to list the statutes, rules, or legal duties that are alleged to have been violated, which involves no subjective or qualitative analysis, and requires a brief description of the alleged conduct, which can be drawn from the relevant complaint or charging document without creating any implication that the firm concedes anything about the allegations. If grounds exist, under Rule 2300, for keeping the reported information confidential, the firm may request confidential treatment.

Form 3 requires a firm to file a special report if it enters into certain specified relationships with individuals or entities that are currently subject to any of the following: (1) A Board disciplinary sanction suspending or barring an individual from being an associated person of a registered public accounting firm, (2) a Board order disapproving an entity's application for registration, or (3) a Commission order under Rule 102(e) of the Commission's Rules of Practice suspending or denying the privilege of appearing or practicing before the Commission. Commenters suggested that the scope of relevant individuals should be limited to those who provide audit services. Although the Board has made such a change to the similar Form 2 requirement, such a change is not appropriate for this Form 3 requirement, which is generally intended to gather information about new relationships with persons or entities that are effectively restricted from providing audit services. In this context, the qualification suggested by commenters would have the effect of either negating the requirement entirely or transforming it into a requirement for a firm to report that a person or entity is violating such a restriction in connection with audits performed by the firm. For similar reasons, the Board has rejected suggestions to narrow the scope of consulting and professional services received by the firm that trigger this reporting requirement.

Commenters also expressed concern about the burden associated with identifying the existence of the sanction or 102(e) order. Firms should understand, however, that to a significant extent that burden effectively exists regardless of whether the firm has a reporting obligation. Not only does the firm have an obvious need to know, for its own purposes, of any such limitations on the person's ability to provide services, but Board Rule 5301(b) provides that ''no registered public accounting firm that knows, or in the exercise of reasonable care should have known, of the suspension or bar of a person may permit such person to become or remain associated with it, without the consent of the Board, pursuant to Rule 5302, or the Commission.''[4]

Form 3 requires a firm to file a special report regarding certain changes in its authorization to engage in the business of auditing or accounting in a particular jurisdiction. After considering comments, the Board has made wording changes to clarify three points: (1) The requirement is intended only to cover circumstances that involve a loss of the firm's authorization to engage in the business of auditing or accounting; (2) the proposed phrase, ''made subject to condition or contingencies,'' was not intended to encompass conditions or contingencies that are broadly applicable to all firms licensed in the jurisdiction; and (3) the requirement to report new licenses or certifications, or changes in existing licenses or certifications, is limited to licenses and certifications that authorize the firm to engage in the business of auditing or accounting.

The proposed rules would have required that special reports on Form 3 be filed no later than 14 days after the triggering event. Several commenters expressed concern that 14 days was not sufficient time in which to review and assess an event and report the required information, and that this was particularly true for non-U.S. firms that may need to assess possible legal obstacles to reporting and prepare the materials necessary to comply with Rule 2207. Commenters' alternative suggestions included 30 days, 45 days, 60 days, and 90 days. The Board is persuaded that a longer period than 14 days is appropriate and is adopting a requirement to file special reports within 30 days of the triggering event.

Commenters also raised questions about when, for certain reportable events, the ''trigger'' actually occurs. In particular, several triggering events are described in Form 3 in terms of when the firm has ''become aware'' that something has occurred. Commenters asked for clarification of what it means, in this context, to say that the firm has become aware of a matter. The Board has added a note to the beginning of Part II of Form 3 to specify that the firm is deemed to have become aware of the relevant facts on the date that any partner, shareholder, principal, owner, or member of the firm first becomes aware of the facts. The Board believes it is reasonable to expect a firm to have controls designed to ensure that any such person who becomes aware of relevant facts understands the firm's reporting obligation and brings the matter to the attention of persons responsible for compliance with the obligation.

As proposed, Rule 2205 would have required a firm to amend its filing within a fixed time after becoming aware of an error or omission. Commenters raised concerns about the practical difficulties posed in this context by reliance on the concept of a firm becoming ''aware'' of an error or omission. The Board recognizes those difficulties. Rather than prescribe requirements for firms to have systems and procedures to surface such errors or omissions and then report them within a prescribed time, the Board's revised approach relies on the firm understanding its self-interest. The Board expects annual and special reports to be complete and accurate, and inaccuracies or omissions could form the basis for disciplinary sanctions for failing to comply with the reporting requirements reflected in Rules 2200 and 2203 and the instructions to Forms 2 and 3. Firms should be sufficiently motivated to have procedures to detect any need for amendments, and to amend filings as soon as possible, in order to mitigate the possibility of disciplinary sanctions for the inaccurate original filing.

The amendment to Rule 4000 adds a paragraph providing that the Board, in the exercise of its inspection authority, may at any time request that a registered firm provide additional information or documents relating to information provided on Form 2 or Form 3, or relating to information that has otherwise come to the Board's attention. The amendment provides that the request and response are considered to be in connection with the firm's next regular or special inspection. In response to concerns raised by some commenters, the Board confirms that the information-gathering activity described in the amendment is an exercise of the Board's inspection authority. It does not provide a basis for the Board to compel a firm to provide information beyond the scope of information encompassed by the inspection authority, or for purposes other than assessing compliance by the firm or its associated persons with the

[4] Rule 5301(b)'s prohibition on allowing such a person to ''become or remain associated with'' the firm is not a prohibition against any and all employment or other relationships, but only a prohibition against allowing the person to be an ''associated'' person as that term is defined in Section 2(a)(9) of the Act and Board Rule 1001(p)(i).

''Act, the rules of the Board, the rules of the Commission, or professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers.''[5]

Annual and special reports will be made public on the Board's Web site promptly upon being filed by a firm, subject to exceptions for information for which a firm requests confidential treatment. The amendments to Rule 2300 require that a firm support a request with both a representation that the information has not otherwise been publicly disclosed and either (1) a detailed explanation of the grounds on which the information is considered proprietary, or (2) a detailed explanation of the basis for asserting that the information is protected by law from public disclosure and a copy of the specific provision of law. The amendments also provide that the firm's failure to supply the required support constitutes sufficient grounds for denial of the request.

In response to questions raised by commenters, the Board emphasizes that this approach to confidential treatment requests does nothing to change a firm's right to seek review of an initial denial of confidential treatment. Initial decisions will continue to be made by the Director of Registration and Inspections, pursuant to delegated authority, under Rule 2300(h). A firm may, under Rule 5468, seek Board review of any denial.

One commenter noted that confidentiality protection might arise from sources other than statutes and regulation, including common law, judicial orders, and contractual terms, and that the Board should more broadly define the scope of documentation that may be presented in support of a confidential treatment request. Rule 2300(b), however, does not limit the scope of documentation that a firm may present to support its argument that the rule's criteria for confidentiality are satisfied. The Board also agrees that ''applicable law related to the confidentiality of proprietary, personal, or other information'' that may protect information from public disclosure is not limited to statutes and regulations. At the same time, however, a contractual agreement between two parties does not constitute ''applicable law'' and is unlikely to satisfy the rule's criteria.

Under proposed Rule 2207, a non-U.S. firm may initially withhold required information from Form 2 or Form 3 if it could not provide the information without violating non-U.S. law. If non-U.S. firm withholds information on that ground, it must have certain supporting materials, including (1) a copy of the relevant provisions of non-U.S. law, (2) a legal opinion concluding that the firm would violate non-U.S. law by submitting the information to the Board, and (3) a written explanation of the firm's efforts to seek consents or waivers that would be sufficient to overcome the conflict with respect to the information.

To address a concern raised by commenters, the Board has revised Rule 2207(c)(4), and added a related note at the end of the rule, to make clear that the rule does not require a firm to repeat previously futile efforts to obtain consents and waivers. Specifically, Rule 2207(c)(4) requires the firm to prepare and maintain a written representation that it has made ''reasonable efforts'' to obtain relevant consents and waivers. The note at the end of the rule makes clear that the ''reasonable efforts'' element of the rule does not require either (1) that the firm renew efforts with parties that have previously declined to provide consents or waivers with respect to similar types of information, or (2) that the firm seek consents or waivers from parties other than firm personnel and firm clients.

In its initial proposal, the Board stated that it intended for the reporting requirements to take effect 21 days after Commission approval, with ''catch-up'' Form 3 filings due 14 days later. The Board has considered comments expressing concern that this is too ambitious a schedule, and the Board is now taking a different approach. The Board intends that the rules, rule amendments, and Forms 2 and 3 that it is adopting today will take effect on the date that is 60 days after Commission approval. This will build in more than ample lead time for firms to become aware of Commission approval of the rules and to prepare any reports that will be due after the rules take effect.

III. Date of Effectiveness of the Proposed Rules and Timing for Commission Action

Within 60 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Board consents, the Commission will:

(a) By order approve such proposed rules; or

(b) institute proceedings to determine whether the proposed rules should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rules are consistent with the requirements of Title I of the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/pcaob.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number PCAOB 2008–04 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number PCAOB 2008–04. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/pcaob/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule that are filed with the Commission, and all written communications relating to the proposed rule between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the PCAOB. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. PCAOB–2008–04 and should be submitted on or before July 20, 2009.

[5] Section 104(a) of the Act.

By the Commission.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–14294 Filed 6–17–09; 8:45 am]

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H.R. 131/P.L. 111–25

Ronald Reagan Centennial Commission Act (June 2, 2009; 123 Stat. 1767)

Last List May 27, 2009

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